CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~396~~ 39.

ROTHSCHILD & BROTHER, APPELLANTS,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 19, 1899.

(17,412.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 298.

ROTHSCHILD & BROTHER, APPELLANTS,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1899.

1 United States Circuit Court of Appeals for the Second Circuit

ROTHSCHILD & BROTHER, Appellants,
vs.
UNITED STATES, Appellee.

This cause came on to be heard and is now pending in this court upon an appeal from an adjudication of the circuit court of the United States for the southern district of New York reversing a decision of the board of general appraisers made pursuant to section 14 of the customs administrative act of June 10, 1890.

The appellants imported from San Domingo into the port of New York in September, 1897, certain bales of unstemmed leaf tobacco, the product of San Domingo, in which bales there was mixed or packed with filler tobacco less than four per centum of leaves suitable for wrappers. The collector of the port assessed duty upon the leaves of filler tobacco in each bale at the rate of thirty-five cents per pound, and upon the leaves suitable for wrapper at one dollar and eighty-five cents per pound, assuming to do so conformably with the provisions of the tariff act of July 24, 1897 (Schedule F, 213, 214), imposing duty on wrapper and filler tobacco as follows: "Par. 213. Wrapper tobacco, and filler tobacco when mixed or packed with more than fifteen per centum of wrapper tobacco,
2 and all leaf tobacco the product of two or more countries or dependencies when mixed or packed together, if unstemmed, one dollar and eighty-five cents per pound; if stemmed, two dollars and fifty cents per pound; filler tobacco not specially provided for in this act, if unstemmed, thirty-five cents per pound; if stemmed, fifty cents per pound." "Par. 214. The term wrapper tobacco as used in this act means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco."

Certain questions of law arise in the cause, concerning which the court desires the instruction of the Supreme Court for its proper decision, and which are as follows:

1. Is it the meaning of the tariff act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package?

2. Is it the meaning of said act to subject to the duty of one dollar and eighty-five cents per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety at the date of the enactment, were commercially known in this country as "filler tobacco" and bought and sold by that name, notwithstanding such leaves constitute less than fifteen per centum of the contents?

In accordance with the provisions of section 6 of the act of

March 3, 1891, establishing circuit courts of appeal, etc., the
3 foregoing questions of law are by the circuit court of appeals hereby certified to the Supreme Court.

Dated the 2nd day of May, 1899.

WM. J. WALLACE,
U. S. Circuit Judge.
N. SHIPMAN,
U. S. Circuit Judge.

4 UNITED STATES OF AMERICA, } ss.:
Second Circuit, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled Rothschild & Brother against The United States was duly filed and entered of record in my office by order of said court on the 2nd day of May, 1899, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-second.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, cancelled 5, 2, '99. W. P.]

[Endorsed:] United States circuit court of appeals, second circuit. Rothschild & Brother, appellants, *vs.* United States, appellee. Certificate.

Endorsed on cover: (Certificate.) File No., 17,412. U. S. C. C. of appeals, 2nd circuit. Term No., 298. Rothschild & Brother, appellants, *vs.* The United States. Filed May 19th, 1899.

7619

No. 298.

Motion to advance

Office Supreme Court U. S.
FILED
JAN 22 1900
JAMES H. McKENNEY,
Clerk.

Filed Jan. 22, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

ROTHSCHILD & BROTHER
v.
THE UNITED STATES. } No. 298.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

ROTHSCHILD & BROTHER
v.
THE UNITED STATES. } No. 298.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

Now come the appellants, Rothschild & Brother, and move the court to advance the above-entitled cause and to set the same for hearing at an early date, and give therefor the following reasons:

First. That the question of law raised in the certificate filed in this cause involves the construction of paragraphs 213 and 214 of the tariff act of July 24, 1897, Schedule F, imposing duty on wrapper and filler tobacco.

Second. Because the cause was certified to this court by two judges of the circuit court of appeals on a division.

Third. Because the question involved has been decided in favor of the Government in the United States circuit court for the southern district of New York, and has been decided against the Government by the United States circuit court for the southern district of Florida, and the appeal of the Government in the Florida case is now pending in the United States circuit court of appeals for the fifth circuit.

Fourth. That a very large number of cases involving the classification and assessment of duty on tobacco are now pending before the United States Board of General Appraisers, the protests being filed from all parts of the United States, and all of said cases are suspended, and the liquidation of the entries held up, pending the decision of this, and it is to the interest of the Government, as well as to that of all importers of tobacco, to have a speedy construction of the statute in question.

The Solicitor-General, on behalf of the United States, concurs in this motion.

EDWARD R. GUNBY,
Attorney for Appellants.

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No. 298 59

FILED
FEB 7 1900
JAMES H. McKENNEY,
Clerk.

Brief of Gunby for Appts.

IN THE

Supreme Court of the United States.

Filed Feb. 7, 1900.

October Term, 1899.

No. 298.

ROTHSCHILD & BROTHER,
Appellants,
vs.
THE UNITED STATES,
Appellee.

Certificate of Appeal to the Supreme Court of the United States from the U. S. Circuit Court of Appeals for the Second District.

BRIEF OF APPELLANTS.

EDWARD R. GUNBY,
Attorney for Appellants

M. D. Cushing, Printer, Troy.

IN THE

Supreme Court of the United States.

October Term, 1899.

No. 298.

ROTHSCHILD & BROTHER, Appellants, *vs.* THE UNITED STATES, Appellee.	Certificate of Appeal to the Supreme Court of the United States from the U. S. Circuit Court of Appeals for the Second District.

BRIEF OF APPELLANTS.

STATEMENT OF CASE.

On the 18th day of September, 1897, Rothschild & Brother imported from Porto Plato, Santa Domingo, forty-five (45) bales of unstemmed leaf tobacco and entered same at the Custom House in New York as "filler" tobacco.

On the 5th of November the entry was liquidated on the return of the Appraiser and four (4) bales of tobacco, towit: Nos. 68, 71, 83 and 86, were returned as containing *wrapper tobacco*, as follows:

No. 68—1-$\frac{123}{577}$ per cent.
No. 71—3-$\frac{488}{606}$ per cent.
No. 83—2-$\frac{32}{534}$ per cent.
No. 86—2-$\frac{138}{531}$ per cent.

Duty was assessed on these bales of tobacco on the percentage of wrapper contained in the bales so returned by the Appraiser, at $1.85 per pound, and the remainder of the tobacco in each of said bales was returned as "*filler*" tobacco and duty assessed on same at 35 cents per pound, under Sections 213 and 214 of the Act of Congress, approved July 24, 1897.

A protest against this classification of duty at $1.85 per pound on any quantity of tobacco in these bales, as wrapper, was duly filled, as none of the bales contained more than fifteen (15) per cent. of "wrapper" and each bale was contended to be "filler" and was legally dutiable at 35 cents per pound.

On the 17th day of November, 1897, this protest was heard by the Board of U. S. General Appraisers, witnesses being examined both by the protestant and the Government, and on the 29th day of November, 1897, an opinion was rendered by the said Board sustaining the protest and for the first time construing Sections 213 and 214 of the Act of Congress of July 24, 1897, General Appraiser Tichenor filing a dissenting opinion.

An appeal was taken from this decision to the Circuit Court of the United States for the Southern District of New York, and on the 27th day of May, 1898, the decision of the U. S. General Appraisers was reviewed and a decision rendered by the Hon. E. Henry Lacombe, reversing the ruling and decision of the said Appraisers, and on June 16, 1898, an appeal was duly allowed from said decision to the U. S. Circuit Court of Appeals for the Second District:

The decision of the Circuit Court is as follows:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

United States
vs.
Rothschild & Bros. } 2684

Appeal from a decision of the Board of General Appraisers, reversing a decision of the Collector of the Port of New York touching the duty on certain wrapper tobacco found packed in bales of filler tobacco, but not exceeding 5 per cent. of each bale.

Lacombe, C. J.:

Amid the awkward, tortuous and obscure phraseology of Paragraph 246 of the Act of 1883, one thing was manifest, namely, that in determining whether any particular leaf tobacco should pay a lower or a higher rate, it would be necessary to calculate a specified percentage of something. It became absolutely necessary, in order to apply the rule prescribed in the paragraph, to determine upon what base or on what unit such percentage should be calculated. In Falk *vs.* Robinson, 137 U. S., 225, the Court had to deal with an abnormal, if not a bogus, bale, and it is not surprising that the language used in the opinion was not practically of much use when normal commercial bales came under consideration. The necessity of finding a base number or unit available for such cases could not be overlooked *in re* Blumlein 5 C. C. A., 93; such a unit was declared to be the bale, and it is understood that the conclusion upon that point reached in that case has not since been questioned.

Erhardt v. Shroeder, 155 U. S., 124;
U. S. v. Rosenwald, 14 C. C. A.

The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnnecessary to fix upon any base number or unit at all. Quite possibly the percentage method was restored by the Wilson tariff of 1894, indirectly by the use of the words "commercially known;" but there seems much force in the suggestion that when those words were dropped out of the Dingley tariff of 1897, the

percentage system dropped with them. Of course if the percentage system were abandoned, the necessity of determining a unit or base number ceased also and the decisions in the cases cited would be no longer instructive. Construing the phraseology of the Act of 1897, without reference to the earlier statutes and decisions, the correct paraphrase of the paragraphs 213 and 214, so far as they relate to unstemmed leaf tobacco, may be stated thus:

A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers and not otherwise provided for.

A duty of one dollar and eighty-five cents per pound shall be paid on

(A) All leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco which other tobacco is the product of any other country or dependency.

(B) All leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent. of tobacco which is suitable for cigar wrappers.

(C) All leaf tobacco suitable for cigar wrappers.

The language used in the act seems to indicate that the draughtsman has tried to cut loose from earlier legislation and the decisions predicated thereon, and the case seems to be one where the language of the later act may fairly be construed without much regard to the construction put upon earlier and much more intricate phraseology.

I am strongly of the opinion that except for the purpose of imposing a penalty on any one importing an abnormal bale, (i. e., as the evidence shows one with more than 15 per cent. wrapper to less than 85 per cent. filler) any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found and in whatever amount, shall pay the higher rate.

Inasmuch as the case will undoubtedly be appealed, it seems unnecessary to discuss the question presented at any greater length.

Decision reversed and Collector sustained.

This cause came on duly to be heard in the Circuit Court of Appeals, and on the———day of———, 1899, was certified by the Judges of the Circuit Court of Appeals to this Court for its opinion upon the construction of the statutes under which the classification of this tobacco was made.

ARGUMENT.

The errors assigned in this case raise only one question for the decision of this Court, viz: What is the proper construction of Sections 213 and 214 of the tariff act of 1897?

The Government contends that a proper administration of this act demands the collection of the higher rate of duty on all leaf tobacco suitable for wrappers for cigars contained in any bale, box or package, where the quantity contained in said bale is 15 per cent., or less, at $1.85 per pound, permitting the importer to pay the lower rate of duty of 35 cents per pound on all *filler* tobacco contained in said bales; but should a bale or package contain more than 15 per cent. of leaves suitable to wrap cigars, then the importer shall be compelled to pay $1.85 per pound, the higher rate of duty, on the entire bale or package, no matter what quantity of it is suitable for *filler* tobacco only.

The appellants contend that a proper construction of the statute in question fixes the duty on all bales of tobacco containing less than 15 per cent. of leaves suitable for wrappers for cigars, at 35 cents per pound, and on all bales of such quality as that the leaves suitable for wrapper in them exceed 15 per cent., at $1.85 per pound.

In construing the statute, the intent of the legislator must be ascertained, if possible, by the language of the statute itself. If it is unequivocal, plain, and expresses clearly what the legislative intent was, then the courts have no right to control or modify it by speculation, and there is no necessity for resorting to any rules of construction other than the clear meaning of the words used, unless there is ambiguity and the statute is susceptible of more

than one construction; but it frequently becomes necessary in order to arrive at the intent of the law-maker, to examine and consider repealed or expired acts *in pari materia* and to consider and examine the history of legislation affecting the same subject matter.

In re Southern Pacific Co., 82 Fed. Rep. 311-313.

We respectfully submit: *First*, that the plain language of the statute sustains our contention. *Second*, that the history of legislation upon this question shows very clearly the intention of Congress in using the language found in Sections 213 and 214.

The language of the statute is as follows:

"Par. 213. Wrapper tobacco, and filler tobacco, when mixed or packed with more than 15 per cent. of wrapper tobacco, and all leaf tobacco, the product of two or more countries or dependencies, when mixed or packed together, if unstemmed, $1.85 per lb.; if stemmed, $2 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35 cents per lb.; if stemmed, 50 cents per lb."

"Par. 214. The term wrapper tobacco, as used in this act, means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco."

Collectors of Customs shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, *of any leaf tobacco*, unless the invoices of the same shall specify *in detail* the character of such tobacco, whether wrapper or filler, its origin or quality.

In the examination for classification of any imported leaf tobacco, at least one bale, box or package in every ten and at least one in every invoice, shall be examined by the Appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box or package."

Tobacco is imported in bales, boxes or packages, and it has been heretofore decided that for the examination of tobacco for the purpose of arriving at its classification, the bale is the unit, and this, it seems, has not been questioned by the Honorable Judge of the Circuit Court.

See Erhardt v. Schroeder, 155 U. S. 124.
U. S. v. Rosenwald, 14 C. C. A.
U. S. v. Blumlein, 55 Fed. Rep. 383, 5 C. C. A. 142.

And if there should be any question that this was the intention of Congress, reference to the language of the statute itself would settle the matter.

The latter clause of Section 214 reads as follows: "In the examination for classification of any imported leaf tobacco, at least one *bale*, *box* or *package* in every ten, and at least one in every invoice, shall be examined by the Appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box or package."

It was clearly intended by Congress that tobacco, for the purpose of classification, should be grouped in bales, boxes or packages and that the single commercial package should be the unit upon which the classification or examination should be made. If this is true, there are two classes of tobacco subject to a duty of $1.85 per pound.

First. Wrapper tobacco.

Wrapper tobacco is that quality or character of tobacco as to be bought and sold and dealt in, at home and abroad, as *wrapper*. It is imported and handled in bales—not pounds, or leaves, nor hands—but in commercial packages called *bales*; and when Congress said *wrapper* tobacco, it meant a *bale of wrapper tobacco*—tobacco where *wrapper* was the predominating quality.

Second. One dollar and eighty-five cents a pound duty was imposed on certain grades of *filler* tobacco, viz: "Filler tobacco mixed or packed with more than 15 per cent. of wrapper."

Our contention is that the same unit, for examination, exists and is to be recognized in the examination of *filler* tobacco as in the examination of *wrapper* tobacco; and when an examination of a bale of filler tobacco shows that it is uniformly of a grade which carries mixed in it leaves suitable for wrapping cigars, over 15 per cent , while it does not make the bale a bale of *wrapper*, it imposes upon it the same duty as it imposed upon a bale of wrapper tobacco. But when an examination discloses that there is a percentage of leaves contained in the bale of *filler* less than 15 per cent., then the entire bale is, under the law, dutiable at 35 cents per pound.

If Congress had intended, as contended by the Government, that all leaves of tobacco suitable for *wrapper* for cigars, wherever found, should be dutiable at $1.85 per pound, then the language used in the statute—"and *filler* tobacco when mixed or packed with more than 15 per cent. of wrapper"—is wholly unnecessary and misleading. No fifteen per cent. clause need have been put in the law, and the importer whose bale of tobacco contained 10 per cent. of *wrapper* and 90 per cent. of *filler* could have paid his duties in accordance with its quality and, if the bale contained 20 per cent. of *wrapper* and 80 per cent. of *filler*, the same rule would have applied and he would have paid the higher rate of duty on whatever quantity of *wrappers* was found in his importation.

But under the rule imposed by the decision of Judge Lacombe, the Government collects $1.85 per pound on all *wrapper* leaves contained in a bale when the amount is less than 15 per cent., permitting the payment of the duty on the *filler* at 35 cents per pound; but, if the bale is of such quality that it contains 16 or 18 per cent. of *wrapper*, then duty is collected not only upon the wrapper so contained in the bale, but upon the remaining 82 or 84 per cent. which is contained in the bale which is admitted to be *filler*.

The Board of General Appraisers decided that, for the purpose of the assessment of duty, there were three kinds of tobacco.

First. Wrapper tobacco.

Second. Filler tobacco mixed or packed with more than 15 per cent. of wrapper tobacco.

Third. All other *filler* tobacco.

And this decision was based, not only upon the language of the statute itself and the testimony of the witnesses in the case, but upon the history of so-called tobacco legisiation and an examination of acts *pari materia*, beginning with the act of 1883.

We now come to the examination of the various acts of Congress imposing duties upon tobacco leading up to the act now before the Court.

The first tariff act which recognized the difference between *wrapper* and *filler* tobacco and imposed differential duties, was the act of 1883, paragraph 246, as follows:

"Leaf tobacco of which 85 per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, if not stemmed, 75 cents per pound; if stemmed, $1.00 per pound."

Under the liberal provisions of this act, as construed by the courts, a bale of tobacco, properly and honestly packed, might contain 84 per cent. of leaves suitable in fineness, texture, etc., for wrapper and yet be dutiable at 35 cents per pound, the *filler* rate then and now, Congress declaring, in effect, that unless a bale of tobacco was of such a grade or quality as to contain 85 per cent. of *wrapper* it should not be a *wrapper* bale. The line of demarcation between wrapper and filler was placed by the courts then at 85 per cent., and there it remained until the act of October 1st, 1890.

Act of October 1, 1890, Paragraph 242:

"Leaf tobacco suitable for cigar wrappers, if not stemmed, two dollars per pound; if stemmed, two dollars and seventy-five cents per pound; *Provided*, That if any portion of any tobacco imported in any bale, box or package or in bulk shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box or package or bulk shall be dutiable, if not stemmed, at two dollars per pound; if stemmed, at two dollars and seventy-five cents per pound."

About the time of the passage of the act of 1883, wrapper tobacco began to be imported in considerable quantities from the Island of Sumatra, and between 1883 and 1890 the importation and use of this tobacco had increased enormously and was imported and used "*for wrapper purposes only;*" and the result of the act of 1883 was that all of those grades of Sumatra tobacco which did not come up to the standard of weight, texture, etc., prescribed in that act, even though it were wrapper tobacco and used for nothing else, came into this market at 35 cents per pound. And it was in order to correct this that paragraphs 242 of the act of 1890 was framed and passed.

The bale was still recognized as the unit, but the extent of the importation of tobacco from the Island of Cuba, Mexico and other points was certainly not contemplated by the framers of the McKinley bill.

It was found that a strict construction of this paragraph of the law of 1890 would absolutely prohibit the importation of all filler tobacco except of the very lowest grades and most inferior quality; and after a full hearing on the subject, the Board of U. S. General Appraisers, on the———day of————1892, made a decision that if a bale of tobacco of uniform quality honestly packed contained less than 15 per cent. of leaves which could be used for wrappers, said bale contained no portion of tobacco of the quality known commercially as "wrapper" and the entire bale was dutiable as "filler" at 35 cents per pound.

This decision made it possible to continue the manufacture of cigars in this country made of imported tobacco, and the conclusions of fact set out in this decision have never been questioned. The decision was recognized and followed until the law was repealed and was the first judicial decision as to the proper line between *wrapper* and *filler*, in uniformly and honestly packed *bales* of tobacco, and under it, all grades of *filler* tobacco could be imported.

We quote it in full, as follows:

(12526. G. A. 1210.)

HAVANA LEAF TOBACCO.

Before the U. S. General Appraisers at New York, February 8, 1892.

In matter of the protest, 12239b, of Emilio Pons & Co., against the decision of the Collector of Customs at Tampa, Fla., as to the rate and amount of duties chargeable on certain leaf tobacco, imported per *Mascotte*, January 12, 1892.

OPINION BY SHARRETTS, GENERAL APPRAISER.

The question presented for our consideration in this case is the dutiable character of certain unstemmed Havana tobacco, imported into Tampa, Florida, and classified by the Collector of that port as leaf tobacco containing a portion of leaves suitable for cigar wrappers. Duty was assessed on the tobacco thus classified at $2.00 per pound in accordance with the appropriate provision of paragraph 242, Act October 1, 1890. The importers claim that the tobacco is not suitable for wrappers, and is, therefore, dutiable at 35 cents per pound, under paragraph 243 of said

act. There is no contention that the tobacco was packed with fraudulent intent. The question at issue is, therefore, one of fact. Does the tobacco contain a sufficient quantity of leaves suitable for wrappers to bring it within the scope of the proviso to paragraph 242, which reads as follows:

That if any portion of any tobacco imported in any bale, box or package, or bulk, shall be dutiable, if not stemmed, at two dollars per pound.

The Board has heretofore held that the word "portion" must be held to mean an appreciable quantity, not an exceptional leaf, which has been legitimately packed in a bale, box or package. This ruling has, however, not led to a uniformity of practice at the several ports.

The Secretary of the Treasury, in order to secure a just and equitable determination of the scope of the proviso quoted, requested the Collector of the Port of Tampa, Florida, and experts employed by the Government to appear before the Board and present their views relative to the proper classification of Havana tobacco. In accordance with this request, the gentlemen named appeared before us and testified as to facts pertinent to the present case. Hon. E. R. Gunby, collector of customs at Tampa, made an intelligent and exhaustive statement as to the character of Havana wrapper and filler tobacco, which statement was confirmed by that of the Government experts and the testimony heretofore had by the Board of Importers of and Dealers in Havana Tobacco and Cigar Manufacturers located in New York City.

In accordance with the almost unanimous views expressed by the different parties named, we have reached the following conclusions:

(1) That there is a well-defined difference between Havana wrapper and filler tobacco that is easy of determination.

(2) That Havana wrapper tobacco is in such demand that it is valued at from about two to ten times that of filler tobacco, and is separately packed in Cuba with great care owing to this fact.

(3) That in the best-selected grades of Havana wrapper tobacco there is from 5 to 10 per cent. thereof that is

not suitable for wrapper and is used only for fillers for cigars.

(4) That in the better grades of Havana filler tobacco there is from 10 to 15 per cent. of tobacco that can be used for wrapper for cigars.

(5) That Havana filler tobacco of uniform kind, having 15 per cent. or less of leaves suitable for wrappers for cigars, is not recognized in trade as tobacco containing any portion suitable for wrappers for cigars and can not be profitably separated by larger tobacco dealers or cigar manufacturers, and the percentage, in our opinion, does not constitute an appreciable quantity.

(6) That there are bales of Havana tobacco known as self-working bales, containing over 15 per cent. of leaves suitable for wrappers for cigars, that are known in trade as part wrapper tobacco.

(7) That all Havana tobacco in bales or boxes or packages or in bulk, containing over 15 per cent. of leaves suitable for wrappers, is properly dutiable at $2.00 per pound under paragraph 242.

(8) That Havana wrapper tobacco, intentionally packed with filler tobacco in any bale, box, package or in bulk, and differing therefrom in color, length and quality, is evidence of fraud, and the contents of such bale, box or package, or tobacco in bulk, should be assessed with duty at $2.00 per pound.

(9) That Havana filler tobacco in bond ranges in value from 40 cents to $1.00 per pound.

(10) That the value of Havana wrapper tobacco in bond is from $1.80 to $6.00 per pound.

The above conclusions reached by the Board are in harmony with the views entertained by parties interested in protecting the growers of domestic tobacco. We quote from the address of the New York State Tobacco Growers' Association, (see Revision of the Tariff Hearings Before the Committee on Ways and Means, Fifty-first Congress, First Session, page 858):

The fact is that the line of difference between what is suitable for wrappers in Havana tobacco and filler is more distinct than between wrappers and fillers of any other grade. There is no similarity between Havana wrappers and any other goods in leaf tobacco; hence this talk of importers finding tobacco suitable for wrappers in Havana fillers is humbug.

It is further made to appear that the term any portion "suitable for wrappers for cigars" was designed to prevent the admission of Sumatra tobacco as fillers, which tobacco is suitable only for wrappers and is legitimately imported into the United States for no other purpose than as wrappers for cigars.

An exhibit of the tobacco in question was the subject of expert examination, and from the testimony relative thereto we make the following findings of facts:

(1) That the tobacco in semi-Vuelta, uniform in quality, length and color, and is of the kind known in trade as Havana filler tobacco, leaf, unstemmed.

(2) That it contains from 10 to 15 per cent. of leaves that can be used for wrappers for inferior cigars, but no portion thereof is of the quality known as wrapper tobacco.

(3) That it is of a kind used exclusively by larger manufacturers of cigars as fillers for cigars.

We hold that, within the meaning of the statute, there is no portion of the tobacco covered by this protest suitable for wrappers for cigars.

The protest is sustained.

We call the special attention of the Court to the language found in this decision, viz: That these conclusions were not only confirmed by the Government experts and the testimony had by the Board of Importers of and Dealers in Havana Tobacco and Cigar Manufacturers located in New York City, but were declared to be in harmony with the views entertained by parties interested in protecting the growers of domestic tobacco.

The Board further says that it is further made to appear that the term "in proportion suitable for wrappers"

was designed to prevent the admission of Sumatra tobacco as fillers, which tobacco is suitable only for wrappers and is legitimately imported into the United States for no other purpose than as wrappers for cigars.

Subsequently, the act of 1890, upon the return of the Democratic party to power, was repealed by the act of 1894, known as the Wilson Bill, and the tobacco schedule was contained in paragraphs 184 and 185.

ACT OF AUGUST 28, 1894.

Par. 184. Wrapper tobacco, unstemmed, imported in any bale, box, package, or in bulk, one dollar and fifty cents per pound; if stemmed, two dollars and twenty-five cents per pound.

Par. 185. Filler tobacco, unstemmed, imported in any bale, box, package or in bulk, thirty-five cents per pound; if stemmed, fifty cents per pound; *Provided*, That the term wrapper tobacco whenever used in this act shall be taken to mean that quality of leaf tobacco known commercially as wrapper tobacco; *Provided further*, That the term filler tobacco, whenever used in this act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco; *Provided further*, That if any leaf tobacco imported in any bale, box, package or in bulk shall be the growth of different countries, or shall differ in quality and value, save as provided in the succeeding provision, then the entire contents of such bale, box, package or in bulk shall be subject to the same duty as wrapper tobacco; *Provided further*, That if any bale, box, package or bulk of leaf tobacco of uniform quality contains exceeding fifteen per centum thereof of leaves suitable in color, fineness of texture, and size of wrappers for cigars, then the entire contents of such bale, box, package or bulk shall be subject to the same duty as wrapper tobacco.

Congress, being fully informed of the conditions of trade existing, not only expressly recognized the correctness of the decision of the Board of General Appraisers, heretofore quoted, but practically adopted its language in framing the tobacco schedule.

This act imposes a duty upon *wrapper* of $1.50 a pound in language as unequivocal as that in which the act of 1897 imposes a duty of $1.85 per pound on it, but Congress evidently understood clearly the conditions declared to exist

by the Appraisers in the Pons case, and gave its approval of that decision by a provision that if any bale or package contained more than 15 per cent. of wrapper it should pay the same duty as if it were a bale of wrapper. This proviso was not a penalty, nor in the nature of a penalty; it was the declaration of Congress, as it had been of the Board of Appraisers, that a bale of tobacco that was uniformly of a grade high enough to produce exceeding fifteen per cent. of wrapper, belonged, not to the *filler*, but to the *wrapper* class, and should pay duty accordingly. We call the attention of the Court especially, however, to the fact that this act went further and defined wrapper tobacco to be that quality of leaf tobacco known "commercially" as wrapper.

It is not surprising that there were complaints of evasions of duty under the Wilson bill, and they arose because of the very liberal language used by Congress in defining wrapper tobacco. Tobacco *commercially known as wrapper*, is packed, bought and sold in *bales of wrapper* and not in *filler bales*, and though bales may contain more than 15 per cent. of wrapper or wrapper leaves, as long as the filler is the predominating quality in the bale, it is not known in the market, or *commercially known*, as wrapper. Therefore the use of the words, "commercially known as wrapper," resulted in very liberal appraisements of Havana and Mexican tobacco at the custom houses.

The Dingley bill, which contains the paragraph now before the Court for construction, makes several changes in the tobacco schedule, the first and most important of which is that resulting from the political policy of the party in power, viz: An increase in the rate of duty, and wrapper tobacco instead of paying $1.50 a pound is increased in rate to $1.85 per pound.

The next material change in the language is that the term *wrapper* tobacco, as used in this act, means *that quality of leaf tobacco which is suitable for cigar wrappers;* thus leaving out the language complained of as being too liberal, viz: "commercially known as wrapper."

The so-called 15 per cent. clause which was contained in the Wilson bill was reinserted in the Dingley bill in clearer and more concise language, and the intention of its

use at all could not have been for any other purpose except to permit the importation of grades of tobacco containing less than 15 per cent. of wrapper at the filler rate of duty.

Indeed, there seems to us to be no reason for the language used in section 213 except that it was intended to have put upon it the construction that we have given it. If, as is claimed by the Government, it was the intention of Congress to impose a duty of $1.85 per pound on all wrapper tobacco, wherever found, and a duty of 35 cents a pound on all filler tobacco, wherever found, no reason can be given why any reference should have been made to filler tobacco "when mixed or packed with more than fifteen per cent. of wrapper tobacco." A clear and concise statement that wrapper tobacco should pay a duty of $1.85 per pound, and filler tobacco should pay 35 cents per pound, wherever found, would have been fair both to the Government and to the importer and the latter would not have had the slightest reason for complaint. If the law had been so framed, the importer could have paid duty on his tobacco in the proportion in which the bale was found to contain wrapper and filler tobacco. If a bale of tobacco was found to have ten per cent. of wrapper and ninety per cent. of filler, the duties would have been collected accordingly, and the same rule would have applied had the bale contained sixteen per cent. of wrapper and eighty-four per cent. of filler. But the construction placed upon this law by the Government and by the decision of Judge Lacombe, of the Circuit Court, requires the importer to pay a duty of $1.85 per pound upon all wrapper contained in any bale until it exceeds fifteen per cent.; but should a bale contain sixteen per cent., he is compelled to pay $1.85 a pound, *not only upon the sixteen per cent. of wrapper contained in the bale, but also upon the eighty-four per cent. admitted to be filler* which makes up the balance of the bale.

Congress could not have contemplated or intended a construction so contrary to every principle of right and of justice; and it seems to us that if there were no history of legislation by which the intent of Congress might be arrived at, the absurdity of the construction put upon the statute by the Government would of itself be sufficient to satisfy the Court that the Government's construction can

not stand and was not contemplated by the lawmaker.

We respectfully insist that the opinion and conclusion rendered by the Honorable Judge of the U. S. Circuit Court for the Southern District of New York is entirely erroneous, and we contend that the error of law was the result of erroneous conclusions of fact reached by the eminent Judge.

In his decision Judge Lacombe says: "The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnecessary to fix upon any base number or unit at all. Quite possibly the percentage method was restored by the Wilson tariff of 1894, indirectly, by the use of the words "*commercially known.*" But there seems much force in the suggestion that when those words were dropped out of the Dingley tariff of 1897, the percentage system dropped with them. Of course, if the percentage system were abandoned, the necessity of determining a unit or base number ceased also, and the decisions in the cases cited would be no longer instructive."

Surely, the use of the words "*commercially known as wrapper*," in the Wilson bill, had no bearing whatever upon what the learned judge calls the *percentage question.* The act of March 3, 1894, has a provision that the term *wrapper tobacco*, wherever used in this act, shall be taken to mean that quality of leaf tobacco *known commercially as wrapper tobacco.*

This provision is entirely separate and distinct from the percentage provision. It applies with equal force to a *whole bale, a half bale, or five per cent. of a bale;* it simply defines what shall be considered *wrapper tobacco* in construing the law.

But the further provision of Paragraph 185 is, that "If any bale, box, package or bulk of leaf tobacco of uniform quality contains exceeding fifteen per cent. thereof of leaves suitable in color, texture, etc., for wrapping cigars, then the entire contents of such bale, box or package shall be subject to the same duty as wrapper tobacco."

This last provision was construed to mean that if any bale, box or package of leaf tobacco contained fifteen per cent. or less of leaves suitable for wrapper, then the entire bale should be subject to duty as *filler tobacco*, and was en-

tirely distinct from the provision which defined what was wrapper.

The conclusion of the judge that the percentage system was abandoned, and, therefore, there was no necessity for a unit or base number, must be erroneous, inasmuch as every bale of tobacco examined under the Dingley bill and found to contain three, six, or ten per cent. of wrapper, or any quantity suitable for wrapping cigars, is taxed as *wrapper*, in proportion to the percentage thereof found in the whole bale; and, by virtue of the decision itself which permits the levying of a duty upon percentages ranging from 1 and $\frac{133}{577}$ of a bale to 3 and $\frac{133}{666}$ of a bale, it is rendered absolutely essential that a percentage should be calculated on each bale, and that there should be a bale or unit upon which it is calculated. Therefore, it seems that the conclusion of the learned Judge that the percentage system was dropped is in direct conflict with his conclusion that the higher rate of duty may be collected upon percentages less than fifteen.

Again, the Court says: "I am strongly of the opinion that, except for the purpose of imposing a penalty on anyone importing an abnormal bale, (i. e., as the evidence shows, one with more than fifteen per cent. of wrapper to less than eighty-five per cent. of filler) any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found and in whatever amount, shall pay the higher rate."

Here again the Court declares the abandonment of the percentage system, except for the purpose of imposing a penalty upon anyone importing an abnormal bale. There is not the slightest evidence, nor is there anything in the decisions of the tobacco cases, to show that a bale of tobacco, uniformly and properly packed, which contains more than fifteen per cent. of wrapper tobacco to eighty-five per cent. of filler, is an abnormal bale. On the contrary, the law of 1883 recognizes that a bale of tobacco might contain eighty-five per cent. of wrapper and fifteen per cent. of filler, and not be an abnormal bale. No bale of tobacco is an *abnormal* bale unless it is, intentionally, and for the purpose of defrauding the revenue, packed with two or more separate and distinct grades of tobacco; and the examination provided for by the statute, viz: "*ten*

hands in each bale, box or package examined," (see paragraph 214) is for the purpose of ascertaining whether or not the bale is uniformly and honestly packed, in a proper commercial way.

The conclusion that Congress intended to prescribe a penalty for the importing of a bale of tobacco of such a grade that more than fifteen per cent. of it was wrapper, is untenable, inasmuch as the importation of such a bale is nowhere prohibited by law, but, on the contrary, is distinctly provided for, and provided for because of the fact that Congress understood clearly that the high grades of Havana tobacco imported for the manufacture of cigars frequently contains more than fifteen or twenty per cent. of wrapper tobacco, and, therefore, made the distinct declaration that tobacco of these grades should be considered as bales of wrapper tobacco and pay duty accordingly.

The learned Judge, in his opinion, has based his conclusion that a bale of tobacco with more than fifteen per cent. of wrapper to less than eighty-five per cent. of filler is an abnormal bale, upon the evidence introduced in this cause before the Board of General Appraisers.

We respectfully submit that there is nothing in the evidence which shows that a bale containing more than fifteen per cent. is an abnormal bale. But the evidence does show conclusively that a small percentage of wrapper leaves in a bale, while if they are separated they could be used for wrapping cigars, can not be manipulated in the trade in such a way as to be used for wrappers by any factory. The weight of the evidence shows that no wrappers are obtained out of any bale that contains less than ten per cent. of wrapper leaves. But even the evidence introduced by the Government, viz: that of Mr. Albert T. Dennerly, is clear that unless a bale of tobacco contains more than five per cent. of wrapper no manufacturer could get any wrappers out of it whatever, as it would not pay to select such a small quantity out of a bale.

This is an additional reason for the belief that Congress did not intend that the importer should pay wrapper duty on such small percentages of wrapper tobacco in a bale.

It seems to us entirely unnecessary to quote to this Court the ordinary rules for its guidance in the construc-

tion of statutes. The Court is thoroughly familiar with them. They are elementary and there are no new or unusual ones to be invoked in the construction of the statute in question in this case.

In conclusion, we simply call to the attention of the Court the fact that tobacco is an agricultural product, and it is utterly impossible that it should be found to be of an absolutely uniform kind, quality, color, texture and size. It is not made by machinery, nor cast in molds, and it must be selected on the farms and in the packing house with the best judgment and care of those people who have devoted their time and talents to becoming expert in their particular line of business.

Congress recognized, and this Court will recognize that there must be variations of grade and quality; and as tobacco is packed in the fields, the same conditions attach to it as to the gathering of corn, of apples, of oranges, and other agricultural products. The grades run from the lowest scrap to the highest and most perfect wrapper, and Congress recognized this when it said that bales of tobacco, such as are sold in the markets of the world, in proper commercial packages, of such quality that they carry mixed together wrapper and filler a quantity of leaves suitable to wrap cigars less than fifteen per cent., are filler bales, and dutiable as filler, while those exceeding fifteen per cent. of wrapper belong to a grade high enough to be classed as all wrapper, and shall pay duty accordingly. Even with this construction, the Government takes the eighty-five per cent. to the importer's fifteen per cent., and it seems that this difference ought to be sufficient to protect the Government in every dollar of duty due to it, and the tobacco schedule is severe enough on the importer with this construction.

In the manufacture of high-grade cigars in the United States, (and the business is a very extensive one) it is necessary that high-grade tobacco be used in order to keep up the standard of the cigars made by our manufacturers. To do this, they are compelled whenever a bale of tobacco contains more than fifteen per cent., even though it be sixteen or seventeen per cent., to pay wrapper duty on the entire bale; and it seems a very slight compensation, if the bale contains less than fifteen per cent., to permit its im-

portation at a duty of thirty-five cents per pound on the entire bale.

Should there be any doubt, however, in the mind of the Court as to what the intent of Congress actually was, we beg to say that, as a matter of law, "it is a well settled rule in the construction of statutes levying taxes or duties, that they shall in every case of doubt be construed most strongly against the Government and in favor of the citizens or subjects, and their provisions are not to be extended beyond the clear import of the language used." (See U. S. v. Wigglesworth, Second Story, page 369.) Justice Story, in the above cause, using the exact language quoted, and saying in addition thereto "that revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and therefore are not to be liberally construed."

Respectfully submitted.

EDWARD R. GUNBY,

Attorney for Appellees.

No. 59.

Sty. of Cookingham

Office Supreme Court U.S.
FILED
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JAMES H. MCKENNEY, Clerk.

Filed Oct. 17, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59

ROTHCHILD & BROTHER,
Appellants,

AGAINST

THE UNITED STATES,
Appellee.

CERTIFICATE OF APPEAL TO THE SUPREME COURT FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HENRY J. COOKINHAM,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 298.

ROTHCHILD AND BROTHERS,
Appellants,
against
UNITED STATES,
Appellee.

Brief for Appellants.

This case is here by certificate from the United States Circuit Court of Appeals for the Second Circuit.

The question is the construction of a statute and the subject matter is leaf tobacco.

Before entering into a discussion of the questions it is well to have before the court certain well known facts, and those which Congress will be presumed to have known when the statute to be construed was enacted.

Congress is presumed to have known that leaf tobacco is an agricultural produce; that it is packed in bales, boxes or other packages and imported, classified and dealt in in such packages; that there is a classification known as "wrapper," and also as "filler" tobacco, and that this classification is made upon bales as such; that the tobacco

known as " filler " is used for the body of cigars and the " wrapper " to encompass it to hold the " filler " together and give the cigar the proper appearance to make it salable. In some instances the filler is surrounded first with a " binder " before the " wrapper " is applied.

It is also a well known fact that, in every bale of wrapper tobacco, there is a portion which is not suitable for wrapping cigars; that this portion varies from a small per cent. to fifteen per cent.; that in some tobacco packed, imported and intended as filler there is a small quantity that may be used for wrapping cigars. It is also a fact that no expert can tell by examining the tobacco exactly what portion of any bale is suitable for wrapper. This can only be ascertained by manufacturing the tobacco into cigars. That after a careful selection of wrapper, by an expert, and the manufacturing of such tobacco into cigars a certain per cent. of the cigars must be rejected as unmarketable for the reason that the wrappers are not suitable.

The serious controversy concerning the classification of leaf tobacco arose some time in 1889.

In this discussion we will treat the subject as far as possible in chronological order. Let us commence with the year 1890.

Specific instructions were given by the Secretary of the Treasury, January 27th, 1890, in regard to the method of examining leaf tobacco under the laws of 1883. Directions were given that at least one " bale " in each invoice should be sent to the public store for examination.

*Letter of George C. Tichnor, Assistant Secretary to Collectors of Customs, Synopsis of Decisions Treasury Department, No.*9824.

On September 4th of the same year the Treasury Department again wrote the Collector of New York and stated that the protestants claimed "that the leaf, the "hand, the bale, and the entire importation should be "taken as a unit indicated by the eighty-five per cent. "clause."

Thus it will be seen that the question of the unit for assessment was raised early in the history of the litigation.

Controversies concerning classification of merchandise prior to 1890, were disposed of, generally, summarily, except in rare instances when resort was had to suits in the courts of law. June 10th, 1890, Congress passed the act known as Chapter 407, of the Laws of 1890, entitled "An Act to simplify the laws in relation to the collection "of revenues." By this act the Board of General Appraisers was constituted; and under its authority, the President appointed very eminent and able men members of the Board. A new method of determining controversies concerning the collection of customs was inaugurated. At first there was less formality in determining these questions than there is to-day. Prior to the decision by the Board in the case at bar, the practice had become fixed and cases were tried before the Board in the same manner as a case is tried in the United States District or Circuit Court. The Board rendered its decisions, generally, by written opinions, assigning the grounds upon which the decisions were based. These opinions will compare favorably with those of any of the courts of the land, whether federal or state.

After a careful examination of every case wherein the questions were the same as those involved here, we submit the following observations to show how the Government has understood and treated the subject. We do this

for the purpose of showing later that Congress intended to do precisely what is contended for by the appellants.

When the board commenced passing upon the questions concerning the duty upon leaf tobacco this court had decided Falk v. Robertson, 137 U. S., 225, and Schroeder v. Erhardt, 155 U. S., 124. These cases had been decided under the act of March 3rd, 1883, United States Statutes at large, vol. 22, page 488. We will first consider this act, the material part of which is as follows:

"Leaf tobacco of which 85 per cent. is of the requisite "size and of the necessary fineness of texture to be suit- "able for wrappers, and of which more than one hun- "dred leaves are required to weigh a pound, if not stem- "med, 75c. per pound; if stemmed, $1.00 per pound."

"All other tobacco in leaf, unmanufactured, and not "stemmed, 35c. per pound. Tobacco, manufactured, of "all descriptions, and stemmed tobacco not specially enu- "merated or provided for in this act, 40c. per pound. "Snuff and snuff flour manufactured of tobacco, ground, "dry, or damp, and pickled, scented or otherwise, of all "descriptions, 50c. per pound. Tobacco unmanufactured "not specially enumerated, or provided for in this act, 30 "per centum ad valorem."

In Falk v. Robertson, and Erhardt v. Schroeder, this act was construed with reference to the peculiar facts in those cases. Let us briefly consider them.

In the case of Falk, Blatchford, speaking for the court, says: "That prior to 1883 leaf tobacco was "bought and sold under different names; that bales of "leaf tobacco in the trade were as a rule homogeneous as "to their contents, each one consisting of only one of "these three classes."

Unquestionably the general statement is correct that tobacco was, prior to 1883, baled, bought and sold in the manner as stated by the learned Judge. And so it still is. Tobacco, in leaf, is to-day bought and sold in "wrapper" and "filler" bales. This is the universal custom. Merchants use these terms, invariably, in connection with importation and buying and selling tobacco in quantity. Nothing has occurred since the act of 1883 in the trade, generally, to change the method of handling leaf tobacco. The only incidents in the history of the subject that, in any way, change the aspect as we understand it, is that some importers have corruptly undertaken to evade the revenue laws by packing and importing tobacco dishonestly. This practice of a few dishonest importers should not be taken as having any bearing upon the general custom among those in trade who deal honestly.

Experts in leaf tobacco vary materially in making estimate of the amount of leaf tobacco in a bale suitable for wrapper. Take for instance the case at bar. It does not require any stretch of the imagination to conclude that one expert might have examined the four bales of tobacco in this case and found no tobacco suitable for wrapping cigars. The Custom House officer who made the examination, having equal ability and honesty of purpose, might make the examination and determine the per cent. of tobacco suitable for wrapper in those bales as reported. There is a wide field for honest difference of opinion. The tobacco was honestly packed and honestly imported as filler tobacco. Under what other class could the importers have entered it in the Custom House? When this tobacco is put upon the market it is offered for sale, not as wrapper nor as part wrapper and part filler; it is offered for sale as *filler* tobacco, sold as such, bought as such, used as such. How then can it be said that in the

commercial world this tobacco is to be treated as part filler and part wrapper and that duties are to be assessed upon it accordingly?

Falk against Robertson was substantially a "moot" case. The importers, by arrangement with the custom house officers, imported the tobacco in bales, each of which contained a quantity of Sumatra leaf tobacco, answering the description in the statute of that dutiable at seventy-five cents per pound, except that it formed only about eighty-three per cent. of the contents of the bale. The rest of the bale consisted of inferior leaf tobacco called "filler," which was separated from the seventy-five cent tobacco by strips of paper or cloth, making the one kind readily separable from the other on the opening of the bale.

The question in this case was, solely, how this tobacco thus packed should be classified. The court laid down no general rule, but held that this particular tobacco packed in an unusual manner should be classified as wrapper and that a bale of this description was not a unit for assessment. We can see no reason why this case has any bearing upon another case where the facts are entirely different. As, for instance, where a shipment of tobacco, honestly packed in bales and imported as filler, in which bales *intermingled* with the filler tobacco there are an occasional leaf of tobacco suitable for wrapper.

In the case of Erhardt vs. Schroeder, the court dealt with an importation of Sumatra tobacco and held that in view of the facts in that particular case the bale was not the unit. The court said, on page 133, upon the subject of the bale being a unit that, "the proper answer to this "question seems to depend upon the particular circum- "stances of a given case . . . . All the tobacco in "question in this case, as the evidence on both sides

" shows, was raised in the same country and was all of " the class known as wrapper. Therefore, any bale, or " indeed the whole invoice, if it might conveniently be " treated as a whole for the purpose, was just such a unit " as was intended by the statute."

We understand this to mean that the whole importation was *wrapper* and it made no difference what the unit was as the result would be the same if the wrapper tobacco in every bale exceeded fifteen per cent. It is notable that this importation was of the class known as " wrapper tobacco." It was treated as such by the importer and the court held that, as it was of the wrapper class, it was dutiable as such. It does not seem that this case would be controlling in a case where the facts were different. Take the following case for instance: If an entire importation was of filler tobacco, honestly and regularly packed, and there was a small per cent. of wrapper leaves, not exceeding 15 per cent., commingled with filler in each of the filler bales, would not those bales, or the entire importation, be the unit of quantity for appraisal? And should they not all be classified as filler? To put any other construction upon the statute of 1883 would render it impossible of enforcement. To eliminate the idea that neither the bale nor the entire quantity was the unit of assessment on bales honestly and regularly packed requires that wrapper duty be assessed upon every leaf which might be contained in any bale of filler tobacco, although it might not amount to one tenth of one per cent. This conclusion is inevitable. If not so, then there must be a dividing line and some limit of per cent. must be fixed below which the quantity of wrapper tobacco in a bale will not be considered. What shall this limit be? As soon as we open this door uncertainty is introduced. One Secretary of the Treasury may say the limit shall be one per cent.; another may say it may be

ten per cent. The Board of General Appraisers, after thorough investigation, and under a statute more stringent than this, said it might be any per cent. below fifteen in a bale before it was an appreciable amount. The government accepted this as the practical solution of the difficulty, as we shall show later on in this argument. On leaving the Schroeder case we do it with the remark that the court laid down no general rule, uttered no dictum, but applied the law to the peculiar facts in that case.

I have not been able to find any decisions by the Board under this act of 1883, in which the question involved is the classification of leaf tobacco.

There had been, however, controversy over the subject and the importers had "respectively and severally, "claimed . . . . . that the leaf, the hand, the "bale, and the entire importation should be taken as the "unit of the quantity indicated by the 85 per cent. clause."

S. T. T. D., 10,232, *Sept. 4th*, 1890.

The next important step in the history of the controversy was the enacting of Chapter 1244 of the Laws of 1890, entitled "An act to reduce the revenue and equal-"ize duties on imports and for other purposes," known as the McKinley Act. The provisions of this act regarding leaf tobacco read as follows:

"242. Leaf tobacco suitable for cigar wrappers, if not "stemmed, two dollars per pound; if stemmed, two dol-"lars and seventy-five cents per pound; provided, that if "any portion of any tobacco imported in any bale, box "or package, or in bulk, shall be suitable for cigar wrap-"pers, the entire quantity of tobacco contained in such "bale, box, or package, or bulk, shall be dutiable; if not "stemmed, at two dollars per pound; if stemmed, at two "dollars and seventy-five cents per pound."

"243. All other tobacco in leaf, unmanufactured and "not stemmed, thirty-five cents per pound; if stemmed "50c. per pound."

In the light of the above decisions in the Falk and Schroeder cases, but under the McKinley Act, the board passed upon the question of the classification of leaf tobacco. The first case was Garcia & Co., (No. 11,217, Synopsis Decisions, Treasury Department, May 8th, 1891.) The board said: "From the testimony we find that *no appre-* "*ciable portion* of the tobacco in question was of such size "and quality and fineness of texture as to be suitable for "cigar wrappers."

There is, here, a clear implication that there was some tobacco in the bales suitable for wrapping cigars.

In 11,231, S. D. T. D., Haas Bros., May 12th, 1891, the board again passed upon the same question and in precisely the same language.

The next case was No. 12,329, Liebes Bros. & Co., Dec. 19, 1891. This case is not very important, except to note the fact that the importation was of Sumatra tobacco; that it was entered as all "filler," and the Board found that it was mostly "wrapper." In arriving at that result the board undoubtedly based its decision upon the same unit. The Government accepted the construction as announced by the Board in the above cases as no appeal was taken.

Next in order of time is the famous Pons case, No. 12,526, S. D. T. D, Feb. 7th, 1892. Prior to the decision in this case, and in the light of the Falk and Schroeder cases, the Board had decided that unless there was an "*appreciable portion*" of wrapper tobacco in a bale it was not to be assessable as such. In this case the Board went still further and fixed a limit to this "appreciable por-

tion." Among other things it held "that Havana filler "tobacco of uniform kind, having 15 per cent. or less of "leaves suitable for wrappers for cigars, is not recognized "in the trade as tobacco containing any portion suitable "for wrappers for cigars and cannot be profitably sepa- "rated by larger tobacco dealers or cigar manufacturers, "and the percentage, in our opinion, does not constitute "an appreciable quantity."

It is a well known fact that Havana tobacco is the best in the world. If 15 per cent. or less of wrapper tobacco in a bale of Havana tobacco was not an "appreciable "portion" of this tobacco, certainly it would not be an *appreciable quantity* of an inferior grade of tobacco.

Let us look a little further into the history of this subject and see how the Government treated it. In the first place no appeal was taken from the decision in the Pons case. It must be presumed, therefore, that the government was, at the time, satisfied with the construction. But, an unforseen difficulty afterward arose in connection with this case. The Minister of the Netherlands called upon the Secretary of State in regard to the case and that officer made inquiry of the Secretary of Treasury concerning it. This inquiry was answered by Secretary Foster, May 7th, 1892, (S. D. T. D., 12,745.) Among other things he said: "By reference to the decision in "question (copy enclosed herewith), it will be seen, that "while the Board of General Appraisers found the "tobacco imported by Mr. Pons to contain from 10 to "15 per cent. of 'leaves that can be used for wrappers "for inferior cigars,' it also found that no 'portion "thereof is of the quality known as wrapper tobac- "co,' and consequently that 'within the meaning of "the statute there is no portion of the tobacco covered by "this protest suitable for wrappers for cigars.' This de-

" cision, therefore, does not necessarily lead to the ad-
" mission at the lower rate of duty of Havana tobacco in
" leaf containing any portion 'suitable for cigar wrappers'
" within the meaning of said paragraph, but merely as-
" serts as a finding of fact that the tobacco under con-
" sideration did not contain any such portion."

This reference to the decision by the Secretary of the Treasury answered the purpose for which it was written, but we submit the decision was much broader than claimed for it by the Honorable Secretary. For, the Board had founded its decision upon the ground that, unless the leaf tobacco, in a bale, suitable for wrapper, exceeded 15 per cent. it was not considered.

Again the Board passed upon the question in No. 13, 434, S. D. T. D. Magee, Sept. 29th, 1892, and in substance reaffirmed what had been held in the Pons case. The government took no appeal. An important incident in the history of the litigation upon this subject occurred at this junction. C. S. Hamlin, Assistant Secretary of the Treasury, on June 12th, 1893, (S. D. T. D. 14,096) addressed a letter of instruction to the collector at the port of New York in which he sets forth the important part of the opinion of the Circuit Court of Appeals in the case of A. Blumlein & Co. This decision was made under the act of 1883. It set forth clearly two points.

First, that the act of Congress " plainly contemplates
" the importation of tobacco of mixed grades and pro-
" vides that when it is thus mixed and eighty-five per
" cent. of it is of the higher grade, such mixed lot shall
" pay seventy-five cents per pound on all tobacco therein
" contained, whether of higher or lower grades. If the
" lot does not contain eighty-five per cent. of the higher
" grade the entire lot is to pay the lower duty."

"Second. That the bale was the unit for assessment."

The learned Secretary of the Treasury understood this decision, was satisfied with it, and in this letter directed settlement of the case to be made upon the basis of the decision. Thus by the affirmative act of the government it assented to the two propositions above stated.

It will be noted that this decision was made under the act of 1883. On August 11, 1893, the same officer who had written the letter concerning the Blumelein case issued a circular of instruction to collectors (S. D. T. D. 14,274) in regard to the same subject under the law of 1890. In this letter the acting secretary refers to the Pons case and says that the government did not appeal, but that it relied upon the thoroughness of the examination by the Board. He proceeds then in this circular to give instructions different from the rule laid down in the Pons case.

It is evident that soon after this circular was issued the government realized it had erred in giving these instructions; for, on October 7th, 1893, the Treasury Department issued circular of instructions No. 14,423, S. D. T. D., which reads as follows:

"Treasury Dept., October 7, 1893.

"To Collectors and other Officers of Customs:

"In order to establish uniformity in the classification "of tobacco imported at different ports, the following "rules are hereby prescribed for the guidance of col- "lectors of customs in applying the provisions of para- "graph 242 of the tariff act:

"The paragraph above cited provides 'that if any "portion of any tobacco imported in any bale, box, or

"package, or in bulk, shall be suitable for cigar wrap-
"pers, the entire quantity of tobacco contained in such
"bale, box or package, or bulk, shall be dutiable; if not
"stemmed, at two dollars per pound; if stemmed, at two
"dollars and seventy-five cents per pound.'

"A doubt has arisen at some of the ports as to the
"exact signification of the term 'suitable for wrappers,'
"as used in the paragraph referred to. As a matter of
"fact, it might be possible to apply some leaves in almost
"any package of tobacco to use as wrappers, and a literal
"interpretation of the language of the law might justify
"the exaction of the higher rates of duty upon most of
"the tobacco imported into this country.

"It is hardly necessary to point out the inadmissibility
"of any interpretation which perverts and defeats the
"intention of Congress. The provision referred to is in-
"tended to prevent the willful admixture with filler to-
"bacco of that which is meant for use as wrappers with
"the direct purpose of defrauding the revenue. The
"presence, therefore, in a package of filler tobacco of any
"tobacco which, although capable of use as wrappers for
"inferior and cheap cigars, is not commercially recognized
"in the trade as wrapper tobacco, should not determine
"the classification of the whole package. It is only such
"tobacco, of whatsoever grade, as is commonly and com-
"mercially known as 'wrapper tobacco,' which is referred
"to in paragraph 242 as 'suitable for wrappers.'

"In circular No. 124 the department instructed
"officers of customs that it could not acquiesce in the
'establishment by the Board of General Appraisers of any
"maximum percentage of wrapper tobacco which would
"relieve the merchandise from classification as filler
"tobacco. The law does not establish any such definite
"limit, nor will it bear such a liberal construction; it

"provides that the inclusion of 'any portion' of wrapper "tobacco in a package of alleged filler tobacco shall "subject the entire quantity contained in such package "to classification at the higher rate. The discussions in "Congress in regard to the provision just cited clearly "show that its object was the frustration of all attempts "at evasion of the duty by the intentional mingling of "different classes in the same package. It would be "manifestly, however, a strained construction of the law "to classify the whole contents of a package as wrapper "tobacco merely because of the incidental commingling "of stray leaves of a quality or size suitable for possible "use as wrappers. Such an interpretation would be "prohibitive of all importations of filler tobacco, whereas "the provision is to be administered not as an unreason-"able and oppressive measure, but as a wise precaution "against fraud. Unless tobacco, commercially recognized "as wrapper tobacco, is designedly packed with filler "tobacco in such a way as to render it difficult of "detection, it should not (unless in what would be "commercially regarded as an appreciable quantity) "interfere with the classification of the package as filler "tobacco.

"In the absence of any specific limitations to the word "'portion' as used in the statute, collectors and appraisers "ing officers should be governed by the views above "set forth, which, while rejecting the arbitrary "line proposed by the Board of General Appraisers, "allow a reasonable margin for such slight admixture of "grades and qualities as may happen incidentally.

"Charles S. Hamlin,
"Acting Secretary."

The construction of this act of 1890 by the secretary in this letter is reasonable and except in one particular is just

what we contend for here in regard to the act. He rejects the idea of the fifteen per cent. limitation. In every other respect his construction is what we deem the correct one in order to carry out the intent of Congress. Attention is called to the fact that the secretary states that "the provision referred to (Section 242 of 1890) is "intended to prevent the *willful* admixture with filler "tobacco and that which is meant for use as wrapper with "the direct purpose of defrauding the revenue." This is precisely what we contend for in regard to this act.

It is well said here, by the secretary, that, to put a literal construction upon the act of 1890 would be prohibitive of the importation of filler tobacco. To put a reasonable construction upon the statute, as is contended for by the Honorable Secretary, would be to permit tobacco packed and imported in good faith as filler to come into the country on filler duty, although a certain per cent. of tobacco suitable for wrapping cigars was found in every bale.

Next in order of time is the Wilson Act, Chapter 349, Laws of 1894, which reads:

"184. Wrapper tobacco, unstemmed, imported in any "bale, box, package, or in bulk, one dollar and fifty cents "per pound; if stemmed, two dollars and twenty-five "cents per pound.

"185. Filler tobacco, unstemmed, imported in any "bale, box, package, or in bulk, thirty-five cents per "pound; if stemmed, fifty cents per pound: Provided, "That the term wrapper tobacco, whenever used in this "Act shall be taken to mean that quality of leaf tobacco "known commercially as wrapper tobacco: Provided fur-"ther, That the term filler tobacco, whenever used in this "Act, shall be taken to mean all leaf tobacco unmanufac-

"tured, not commercially known as wrapper tobacco:
"Provided further, That if any leaf tobacco imported in
"any bale, box, package, or in bulk shall be the growth
"of different countries, or shall differ in quality and value
"save as provided in the succeeding provision, then the
"entire contents of such bale, box, package, or in bulk
"shall be subject to the same duty as wrapper tobacco:
"Provided further, That if any bale, box, package, or bulk
"of leaf tobacco of uniform quality contains exceeding
"fifteen per centum thereof of leaves suitable in color,
"fineness of texture, and size for wrappers for cigars, then
"the entire contents of such bale, box, package, or bulk
"shall be subject to the same duty as wrapper tobacco:
"Provided further, That collectors shall not permit entry
"to be made, except under regulations to be prescribed
"by the Secretary of the Treasury, of any leaf tobacco
"imported in any bale, box, package, or in bulk, unless
"the invoices covering the same shall specify in detail the
"character of the leaf tobacco in such bale, box, package,
"or in bulk, whether wrapper or filler tobacco, Quebrado
"or self-working bales, as the case may be: And Pro-
"vided further, That in the examination for classifi-
"cation of any invoice of imported leaf tobacco at least
"one bale if less than ten bales and one bale in every
"ten bales and more, if deemed necessary by the ap-
"praising officer, shall be examined by the appraiser or
"person authorized by law to make such examination,
"and for the purpose of fixing the classification and
"amount of duty chargeable on such invoice of leaf to-
"bacco the examination of ten hands out of each exam
"ined bale thereof shall be taken to be a legal examina-
"tion."

No. 15,586, S. D. T. D. Garcia, December 27th, 1894, was the next case. The importance of this decision appears in that it was the first one under the act of 1894.

The Board in this case said "there are also certain grades "of tobacco known as working up stock, the trade term "meaning such a bale as would furnish sufficient wrap- "pers to work up the bale, using the remainder for filler, "and these, although not commercially wrapper bales, if "manufactured in their fresh condition would produce a "good percentage of wrapper."

We have here the construction of a new act; and, the Board, following in the line of the decisions under former acts, puts a reasonable and practical construction on the statute. It holds, in substance, that there may be a certain quantity of wrapper tobacco in a bale which Congress intended should pay filler duty.

In the next case, No. 15,692, S. D. T. D., El Paso Cigar Manufacturing Company, January 23, 1895, decided under the act of 1894, the Board said: "It is well "known that, in commercial transactions relating to to- "bacco, the bale is the unit, and the legislation of Congress "was made with reference to that fact. The tariff act of "August 28th, 1894, leaves less room for doubt on this "question than the two acts which preceded it. Here "we find in paragraph 185 the provision that the term "wrapper tobacco, whenever used in this act, shall be "taken to mean that quality of leaf tobacco "known commercially as wrapper tobacco. It would be "unreasonable to suppose that any tobacco containing "over four per cent. of wrapper would be considered "commercially to be wrapper tobacco, and, by a further "provision, it is only when any unit of leaf tobacco of "the uniform quality contains exceeding fifteen per cent. "thereof of leaves suitable in color, fineness of texture and "size for wrapping cigars that such unit shall be sub- "jected to the same duty as wrapper tobacco."

The next case is No. 16,535, S. D. T. D. Bernheim &

Sons, Oct. 1st, 1895, Law of 1894. In this case the protest of the importers was sustained that the tobacco was filler because it did not contain over fifteen per cent. of tocacco suitable for wrapper. In the cases of Sutton Bros., No. 16,735, Dec. 31, 1895, Garcia & Co., No. 16,825, Jan. 15th, 1896, and Salomon & Bro., No. 17,071, March 27th, 1896, and Rothchild Brother, 17,665, Dec. 11, 1896, the same question was passed upon by the Board and the decision was based upon the same principle. These were the last decisions under the act of 1894.

The fact that the governmeat did not appeal from these decisions is exceedingly persuasive in aid of the construction for which we contend.

The next important step in the history of this subject is the passage of Chapter 11, of the Laws of 1897, known as the Dingley Act. The provisions concerning leaf tobacco read as follows :

"213. Wrapper tobacco, and filler tobacco when mixed "or packed with more than fifteen per centum of wrapper "tobacco, and all leaf tobacco the product of two or more "countries or dependencies when mixed or packed to-"gether, if unstemmed, one dollar and eighty-five cents "per pound ; if stemmed, two dollars and fifty cents per "pound; filler tobacco not specially provided for in this act, "if unstemmed, thirty-five cents per pound ; if stemmed, "fifty cents per pound."

"214. The term wrapper tobacco as used in this "act means that quality of leaf tobacco which is suitable "for cigar wrappers, and the term filler tobacco means all "other leaf tobacco. Collectors of customs shall not per-"mit entry to be made, except under regulations to be "prescribed by the Secretary of the Treasury, of any leaf "tobacco, unless the invoices of the same shall specify in

"detail the character of such tobacco, whether wrapper or "filler, its origin and quality. In the examination for "classification of any imported leaf tobacco, at least one "bale, box, or package in every ten, and at least one in "every invoice, shall be examined by the appraiser or "person authorized by law to make such examination, "and at least ten hands shall be examined in each exam-"ined bale, box, or package."

"215. All other tobacco manufactured or unmanufac-"tured, not specially provided for in this act, fifty-five "cents per pound."

We come now to the construction of this statute. I do not deem it necessary to enter into a general discussion of the rules for the construction of statutes; but, I shall have occasion to refer to some which I consider particularly applicable to this case.

Does not the history of this subject under the acts of 1883, 1890 and 1894 establish in regard to tobacco honestly packed, two propositions?

1. That in commerce, among dealers in leaf tobacco, the bale is the unit.

2. That there is in bales of wrapper tobacco a certain amount of filler; and, in filler bales, there may be a small per cent. of wrapper tobacco, which in trade is not recognized.

At the time Congress enacted this statute had it not been established also, by long usage between the government and the importer that the bale was the unit and that *a portion* of wrapper tobacco in a bale of filler should come in on filler duty.

Let us now examine the law of 1897 with a view of

determining what the intention of Congress was when the law was enacted. It is evident that Congress knew the condition of the trade in leaf tobacco and the construction that had been put upon former acts. It recognized the fact, as the Treasury Department had recognized it, that the bale, honestly and regularly packed, was the unit of quantity for assessment; that there might be a portion of wrapper tobacco in a bale of filler that was not taken into account, commercially, by dealers in leaf tobacco.

Congress had no good reason for fixing the fifteen per cent. limit in this act, except the one assigned in the Pons case. It seems fair, therefore, to conclude that the reason given in that case for the fifteen per cent. limit is the same as that which induced Congress to fix the same limit in the act under consideration. Except for this reason why did Congress fix fifteen per cent.? Why was not the limit five or ten or twenty per cent.? Under the act of 1890, the decision had been that the bale was the unit and that unless more than fifteen per cent. of a bale was wrapper tobacco no account was to be taken of it. The Wilson Act, as construed, confirmed this limitation of fifteen per cent. This rule then should continue unless there is a clearly expressed intent, by Congress, in the present act, to abandon it. In this act Congress has not expressly manifested its intent to change the law in that respect, but on the contrary seems to have manifested its intention of removing the doubt in regard to this question, and also as to the unit quantity for assessment. Under section 242 of the act of 1890 leaf tobacco was referred to as being imported "in any bale, box, or package, *or in bulk*." The same is true of section 184 of the act of 1894. The omission of the words "*in bulk*" from the act of 1897, is very significant; for, it practically does

away with the importation of leaf tobacco "in bulk," as it fails to provide any rule for a legal examination of tobacco thus imported. It treats of the "bale, box, or "package" as such, and points out specifically the method for the examination of such packages, but no reference is made to tobacco imported in bulk. Other acts provided for importation of tobacco in bulk, but they did not limit examination of tobacco to that in bale, box or package. This is most significant. Under former acts there was ground for saying that the bale was not the unit, for tobacco imported *in bulk* was referred to. And it might be said that there could be no such thing as a unit where the shipment was "in bulk." In this act no tobacco is mentioned except that in bale, box or package. No examination is provided for or required except in "bale, box or package." The abuse which the Treasury Department had complained of prior to this act of 1897 was not the construction of the law by the Board of General Appraisers, but it was that the method of examination was not effective. Undoubtedly this induced Congress to provide the means of remedying the defects in the administration of the law.

First, by recognizing and fixing a unit of quantity: and

Second, by fixing a method for examining the merchandise.

December 8th, 1897, the Treasury Department recognized that the laws as construed by appellee could not be literally enforced and issued a circular of instruction on the subject (No. 18,663, S. D. T. D.). In this circular the Treasurer said: "Whenever the quantity of wrapper "tobacco found in any bale with filler tobacco shall not "exceed one per cent. of the total quantity of tobacco in "such bale no report of such wrapper tobacco need be "made by the appraisers."

The Government here concedes that there may be a "portion" of every bale of filler tobacco that is suitable for wrapping cigars which is to pay filler duty. It also recognizes the bale as the unit of quantity upon which the per cent. is to be computed. But why should the department fix the amount at precisely one per cent. of wrapper that should not be reported? The Board of General Appraisers had said, repeatedly, that any portion of wrapper tobacco in a bale, less than fifteen per cent., was not taken into account in the commercial world among tobacco dealers, and should not be in assessing duty. To say that precisely one per cent. of wrapper in a bale should not be reported and that $1\frac{2}{17}\frac{3}{7}$ per cent. in a bale should be reported, as in bale No. 68 in this case; and to say this without any clearly expressed statutory requirement fixing the per cent., seems most extraordinary.

A general observation is here pertinent. All through the controversy under the three acts, providing for duty upon leaf tobacco, it appears that the government has concurred in the oft-repeated decisions wherein it was held that, in bales of filler tobacco a certain per cent. of wrapper tobacco, fifteen or less, might legally be imported on filler duty; also that the bale was the unit if honestly and regularly packed. This Congress knew; and, we think, intended to settle the controversy by legislative enactment.

Congress intended in the act of 1897 to recognize the bale, box, or package as the unit of quantity and to divide leaf tobacco thus packed into four classes:

First. Bales in which tobacco suitable for wrapping cigars predominated. These are called wrapper bales.

Second. Bales in which more that fifteen per cent. of the tobacco was suitable for wrapping cigars. These, although not wrapper bales, were to be assessible as such.

Third. Bales in which the tobacco was the product of two or more countries or dependencies, mixed or packed together.

Fourth. Bales of tobacco which were all filler, or which contained fifteen per cent. or less of tobacco which might be used for wrapping cigars.

It seems that the above division was intended by Congress and that this intent is expressed in the above statute. Congress had knowledge of the construction that had been given to the previous acts and the course of the government in administering the law; and, it cannot be presumed that with no reason to induce it and without a clear expression to that effect it intended to change the law in this particular.

If Congress had intended to inaugurate an entirely new method of examination and to adopt a different theory upon which tobacco was to be assessed why did it not so legislate? If the construction which the appellee contends for was that intended by Congress how easy it would have been to put this intent into effect by providing as follows: Leaves of tobacco suitable for wrapping cigars, packed or unpacked, and however imported, at the rate of one dollar and eighty-five cents per pound.

What answer could be made by the importer to the position of the Government if Congress had so legislated? Congress recognized the fact that there was a certain amount of filler tobacco in every bale imported for wrapper and that the importer was compelled to pay wrapper duty upon the filler. That there was another class of bales which might be worked up, known as self-working bales, as they contained a goodly proportion of wrapper, although the preponderance of the tobacco was filler. This amount of wrapper tobacco was known to be, in view of the de-

cisions in the Pons case, an amount above fifteen per cent. Fifteen per cent. of wrapper in a mixed bale does not fix the dividing line between a bale of wrapper and one of filler. It does fix the line when the wrapper, in a mixed bale, is sufficient to be considered commercially. We understand a self-working bale must contain somewhat more wrapper than this. Perhaps it should be eighteen to twenty per cent. Congress knew all this and met the situation by providing that all bales having more than fifteen per cent. of wrapper tobacco should pay wrapper duty. Congress also knew that there was a certain amount of tobacco, apparently suitable for wrapping cigars, that, in reality, was not suitable and that it would be so determined after the cigars were manufactured. It also knew that the examination of tobacco was not and could not be absolutely accurate. To provide for this element of uncertainty and to counterbalance, to some extent, the wrapper duty which the importer would pay upon filler tobacco in a wrapper bale, it intended to permit a certain amount of tobacco that could be used for wrapper to be imported upon filler duty. This was not legislating against the Government, it was adoping, by statute, the well known custom which the Government had established. If it should be contended that this particular provision was made to insure a larger amount of revenue than that required under the Wilson bill, we answer that this argument has no force for the following reason: The change of rate from that fixed by the Wilson bill to that of the Dingley bill was sufficient to accomplish that purpose without the construction contended for here by the appellee. Under the Wilson act wrapper tobacco was to pay a duty of one dollar and fifty cents per pound; whereas under this act it is to pay one dollar and eighty-five cents per pound. An increase of more than twenty-three per cent. This would seem to answer any argument than can be made upon the other side predicated

upon the fact that the Wilson bill was framed by a "tariff for revenue only" Congress and the Dingley bill by a Congress of protectionists.

The appellants claim that whatever the true construction may have been as to the unit rule under all previous acts, under the present act Congress clearly intended to adopt the bale, box or package as the unit.

It may be difficult to hold in mind the idea of a unit as applied to a bale, box or package; whereas, it is easy as applied to some concrete commodity as metal or to a living animal. When thus applied it enforces our position very strongly. Perhaps an idea of this can be better presented by assuming the unit to be a living animal. Suppose the statute were paraphrased and read as follows:

Holstein cows, and Ayrshire cows when having not more than fifteen per cent. of Holstein blood, one dollar and eighty-five cents each; Ayrshire cows not specially provided for in this act thirty-five cents each. Would any one argue that ten per cent. of Holstein blood in an Ayrshire cow should be assessed pro rata at the Holstein rate of duty, and the ninety per cent. of Ayrshire blood in such cow assessed at the lower rate?

When the court comes to the conclusion that the bale is the unit as we believe it will, then the next step is made easy by holding in mind the idea that the unit is as perfect a *single entity* as though it were a living creature. How then can wrapper tobacco (fifteen per cent. or less) in such unit be segregated and assessable as such any more logically than could the fifteen per cent. of Holstein blood in an eighty five per cent. Ayrshire cow.

The last part of section 213 of this act reads as follows: "Filler tobacco not specially provided for in this act, if "unstemmed 35c. per lb.; if stemmed 50c. per lb."

There is no other provision in the statute for assessing filler tobacco except the preceding part of this section where it is provided that filler tobacco contained in a bale with more than fifteen per cent. of wrapper tobacco shall be assessed at $1.85 per pound. We contend that the words "wrapper tobacco" in this section have reference to the commercial term "wrapper tobacco" meaning thereby bales of tobacco known as wrapper, although, in every bale there is a quantity of tobacco not suitable for wrapper. If we are correct in this, then there is no provision of statute laying a duty upon wrapper tobacco in a bale, where it does not exceed fifteen per cent., except that it falls under the last clause of the statute and is to be classified as filler tobacco not specially provided for in the act.

A well established rule of construction of statutes applies here. Words are to be used in their ordinary sense, except when they have reference to a particular trade or business. In such case they are to be construed with reference to that particular trade or business.

Unwin v. Hanson (1891), 2 *Q. B.*, 115.

There is no controverting the fact that the term "wrapper tobacco" and "filler tobacco" are commercial terms and that when used in the trade among dealers they have reference to bales of "wrapper" and bales of "filler" tobacco.

The rule that a statute is to be construed so as to give effect to every part is invoked here. There seems to be no purpose subserved by the fifteen per cent. clause, unless it is to mark the dividing line in mixed bales, between those which shall be considered all wrapper and those that shall be considered all filler. It will not be contended on the other side that a statute imposing duties upon imports is to be strictly construed against the

importer. This court has frequently held that such statutes must be reasonably construed to carry out the intent. Upon this point we agree with our learned friends upon the other side. But we insist that this rule has very little application to the case at bar. The title of the statute under discussion states its object to be to furnish revenue and protect industries.

Whether the construction which we contend for or that contended for by appellee is the true one, the intent of Congress is carried out. Either construction would furnish revenue to the government and provide protection to industries.

The increase of duties on this commodity by more than twenty-three per cent. over that provided for by a democratic Congress is sufficient to show the intent of the legislation.

Appellants insist that where a statute is susceptible of two constructions, either one of which will carry out the intent of the law maker, and one imposes a higher rate of duty than the other, that construction will be adopted which is most favorable to the importer.

Powers v. Barney, 5 Blatchford, 200; Adams v. Bancroft, 3 Sumner, 384; United States v. Wigglesworth, 2 Story, 369; United States v. Ullman, 4 Ben., 547; Hartranft v. Wiegmann, 121 U. S., 609; Merritt v. Welsh, 104 U. S., 694–702.

The clause which imposes wrapper duty on filler tobacco provided it is contained in a bale with more than fifteen per cent. of wrapper, necessarily excludes the idea that fifteen or less per cent. of wrapper tobacco in a bale of filler is to pay wrapper duty.

It cannot be claimed that wrapper duty is imposed upon such tobacco by express words. We, therefore, say

that under the rule *expressio unius est exclusio alterius* such tobacco is excluded from wrapper duty. Broom in his Legal Maxims, page 490, 6 ed., says: "When, for "example, certain specific things are taxed, or subjected to "any charge, it seems probable that it was intended to "exclude every thing else even of a similar nature, and "*à fortiori* all things different in genus and description "from those which are enumerated."

Again the clause of paragraph 213, which reads as follows: "Filler tobacco not specially provided for in this "act, if unstemmed, 35 cents per lb.," must refer to the preceding part of this paragraph. A term almost similar to this was so construed in Smythe v. Fiske, 23 Wal., 374.

In this paragraph there is no provision for assessing filler tobacco in mixed bales whenever the wrapper is fifteen per cent. or less, unless it falls under this last clause, and it seems to be unreasonable that the filler and wrapper in such bale should be segregated and assessed as wrapper and filler when in the commercial world these bales are packed, imported, dealt in and known to the trade in no other way than as filler bales. This Congress knew when it enacted the statute, as it also knew that the government had found it impossible to administer a statute that made no allowance for a small per c. nt. of wrapper coming in on filler duty.

When the act was passed Congress had before it the circular of the Treasury Department which we quote above, No. 14,423, and also the Pons case, [redacted] drafted the bill to meet the conditions presented by them as well as all the other facts connected with the history of the subject.

We do not claim that a construction of the statutes by

the Treasury Department is conclusive upon the court, but we insist that, where the government has gone to trial, repeatedly, upon the question and has been defeated; has failed to appeal, and has acted for years under the statutes as construed, then, in a question of serious doubt, the practical construction should be adopted.

Smythe v. Fiske, 23 Wal., 374–382; McCall v. Lawrence, 3 Blatchford, 360–363; United States v. Johnson, 124 U. S., 236; United States v. Hill, 120 U. S., 169; Brown v. United States, 113 U. S, 568; United States v. Moore, 95 U. S., 760.

In the United States v. Alabama RR. Co., 142 U. S., 616, the court held that when the executive department of the government charged with the execution of a statute gives a construction to it and acts upon such construction for a series of years the court will look with disfavor upon a change whereby the parties who have contracted with the government on the faith of the old construction may be injured.

On principle this case is similar to the one at bar. The importer in this case knowing how the government had construed the tariff laws in regard to leaf tobacco relied upon the construction and imported tobacco with the belief that it would be assessed in accordance with that construction. To put a different construction upon the law now will be to the injury of the importer.

We have not been able to find any authority for the position of the appellee that the court has the right to take into consideration the fact that one of the tariff laws was enacted by a "tariff for revenue only" party, and the other by a "protective" party. The acts of Congress must be construed as a continuous system, and this irrespective of any change in the political complexion of the

legislative bodies. The court can no more take into consideration the political complexion of Congress than it can the private opinion of members of that body.

Hilton v. Merritt, 110 *U. S.*, 97–106.

United States v. Oregon & C. R. Co., 57 *Fed. R.*, 426.

So far as I have been able to find there never was a decision of any court, nor by the Board of General Appraisers, under the act of 1894, except those which determined the bale to be the unit, and that fifteen per cent. or less of wrapper tobacco in a filler bale should come in on filler duty. There never had been any abuses requiring a change of the law under this particular provision. The criticism which was passed upon the Wilson Act was that there were abuses under it from the fact that the term "commercially known as wrapper" was so uncertain that experts could say that a bale of tobacco, although it might contain forty per cent. of wrapper, did not come under the class known commercially as wrapper tobacco. By omitting, therefore from the Dingley Act the terms "commercially known as wrapper" Congress did away with the abuses complained of under the law of 1894.

Appellants have not been able to find a decision of any court, nor of the Board of General Appraisers, under the act of 1883, 1890, nor 1894, except in one instance, holding that the bale was not a unit, or that the wrapper tobacco, if fifteen per cent. or less, in a mixed bale was assessable as such where the tobacco was honestly and uniformly packed and where there was no intention to avoid the higher rate of duty. This one case was decided by District Judge Coxe, in Stachelburg, et al. v. United States, 72 Fed. Rep., 50. There is no reasoning in this case. The learned Judge dismisses the case with the remark that the language is too plain for argument. The

government found, however, that this act could not be enforced in the spirit of this decision as it would have been impracticable and would have defeated the primary purpose of the statute, that of producing revenue to the government.

On the other hand the decisions under all the acts from 1883 down to the case at bar, of all the courts, and the Board of General Appraisers, have been in one direction. That is, that where tobacco is honestly and regularly packed and imported without any intent to defraud the government the bale is the unit, and that a portion of wrapper tobacco in mixed bales with filler is assessable at the rate of filler tobacco.

When the Dingley bill was enacted it had been determined that the law of 1894 did not provide sufficient revenue, and that the law of 1890 could not be literally enforced. It had been found that, if it was literally enforced it would exclude all filler tobacco from the country. Therefore, the Dingley bill could not be framed upon precisely the same line as the McKinley Act. An increase of the revenue was demanded over that provided for by the Wilson Act, and the framers of the Dingley bill sought to meet the situation by remedying the defect in the McKinley Act and increasing the amount of duty as fixed by the Act of 1894. This was effectively accomplished, provided the present act is construed as contended for by the appellants.

If, however, the law is to be construed as contended for by the appellee the situation will be almost precisely the same as it was under the McKinley law. The importers cannot afford to pay wrapper duty on a bale of tobacco in which only sixteen to twenty per cent. of the tobacco is suitable for wrapping cigars. Such a bale cannot be imported unless it is counterbalanced

by a bale containing some wrapper that can come in on filler duty. To illustrate this, let us suppose that a bale of this tobacco is worth at the rate of thirty cents per pound ex duty. We will say, for illustration, that the bale weighs one hundred pounds. This would amount to thirty dollars. Filler duty thirty-five cents per pound thirty-five dollars,—total sixty-five dollars for a hundred pounds of filler tobacco. This is all the tobacco is worth whether there is fifteen or less per cent. of wrapper in the bale. Now, assume that there is in a bale ten per cent. of tobacco suitable for wrapping cigars and that this is assessed at one dollar and eighty-five cents per pound. This adds one dollar and fifty cents for every pound of wrapper tobacco, viz: fifteen dollars, which is to be added to the sixty-five dollars, making eighty dollars for a bale of filler tobacco. The ten per cent. of wrapper tobacco cannot be sold as wrapper tobacco from the fact that the labor in separating it costs as much as the wrapper tobacco is worth over the filler. Therefore, this bale must be sold as filler tobacco and the importer would be the loser. He must, therefore, refuse to import that class of tobacco, and the object of the statute is defeated as the government will receive no revenue from this source.

The percentage clause of the Wilson and Dingley acts, if not precisely the same in words, are the same in substance; or, if there be any difference, the latter act is more favorable to the importer than the former. The Wilson acts reads: "That if any bale, box, package or "bulk of leaf tobacco of uniform quality contains exceed- "ing fifteen per centum thereof of the leaves suitable in "color, fineness of texture, and size for wrappers for "cigars, then the entire contents of said bale, box, pack- "age or bulk shall be subject to the same duty as wrap- "per tobacco."

The Dingley act reads: "Filler tobacco, when mixed "or packed with more than 15 per cent. of wrapper "tobacco . . . . . if unstemmed $1.85 per "pound."

The phraseology has not made the law more favorable to the government than the law of 1894 so far as the fifteen per cent. clause is concerned. If abuses had arisen under the former act and the changing of this phraseology was to cure such abuses it has failed of its object.

We cannot believe that the changing of the phraseology was for that purpose, and we look for some other and we find it in the fact that Congress intended, in view of the previous decisions and the difficulties of the government in forcing the law, to remedy the uncertainty by making the bale the unit and allowing the percentage of wrapper of fifteen per cent. and less in mixed bales to come in on filler duty. The appellee lays stress upon the definition of wrapper tobacco as given in the Dingley act. It is contended that this definition shows that fifteen or less per cent. of tobacco suitable for wrapper in a mixed bale is to be assessed as such. On this point we are of the opinion that the law of 1894 was much more exacting than the present law; for, in that act it was provided: "That if any bale, etc. . . . "contained exceeding fifteen per centum thereof of leaves "suitable in color, fineness of texture and size for wrap-"pers for cigars, the entire contents of such bale . . . "shall be subject to the same duty as wrapper tobacco."

It will be observed that this clause is complete in itself. It is not necessary to refer to the clause of the statute defining wrapper tobacco to determine how such tobacco in a mixed bale is to be assessed. The general definition of wrapper tobacco in the statute has no application to

that tobacco suitable for wrapper in a mixed bale, for there is a specific provision of the statute covering it. If, then, under the Wilson act, the bale was the unit and the wrapper tobacco (fifteen per cent. or less) contained in a mixed bale was not assessable as such, there is much more reason for claiming, under the present law, that such tobacco is not assessable as wrapper.

There is no *specific* provision of this statute providing that wrapper tobacco (fifteen per cent. or less) in a mixed bale is to be assessable as such. The general definition of wrapper tobacco in the statute of 1897 does not vary, materially, from that in the act of 1894. This was found to be the case when the law became operative. When a protest was made under the act of 1894 experts were called to show whether or not the tobacco was such as was "commercially known as wrapper tobacco." Under the present law the same class of evidence is adduced to show whether or not the tobacco is "suitable for wrapping cigars." The question of classification, therefore, depends upon precisely the same class of expert testimony. If there were abuses under the former law and the change in phrascology was a remedial one, it has entirely failed of its purpose.

In construing a statute the rule is that language is presumed to have been used in its ordinary, commercial and popular sense. But where a term has an established usage in commerce and trade and at the passage of the act that usage was definite, uniform and general and not partial, local or personal, it will be construed according to its significance in commerce and trade.

Robertson v. Solomon, 130 U. S., 412-415; Recknagle v. Murphy, 102 U. S., 197; 200 chests of tea Smith claimant, 9 Wheat., 430; 112 casks sugar, 8 Peters, 275;

Arthur v. Lahey, 96 U. S., 112; Greenleaf v. Goodrich, 101 U. S., 278; Arthur v. Cummings, 97 U. S., 236; Tyng v. Grinnell, 92 U. S., 467; Curtis v. Martin, 3 How., 106; Elliott v. Swartwout, 10 Pet., 137; Madock v. Magone, 152 U. S., 368; Sonn v. Magone, 159 U. S. 417.

In this case it seems to be established that the term "wrapper tobacco" has by long, uniform and general usage become well understood in the trade to mean bales of tobacco in which the greater portion is suitable for wrapping cigars.

The appellee may argue that the importer may pack his tobacco so that the mixed bales will contain slightly under fifteen per cent. of tobacco suitable for wrapping cigars and thereby evade the statute by importing wrapper tobacco on filler duty. Suppose this is true. Congress intended he should have this right.

In Merritt v. Welsh, 104 U. S., 694, which was a case involving duty on sugar, Justice Bradley said: "Great "stress is laid on the charge that sugars are manfactured "in dark colors on purpose to evade our duties. Suppose "this is true: has not a manufacturer a right to make his "goods as he pleases? If they are less marketable it is "his loss; if they are not less marketable who has a right "to complain? If the duties are effective there is a plain "remedy. Congress can always adopt such laws and "regulations as it may deem expedient for protecting the "interests of the government." In this case the court held that even if the sugar was colored by the manufacturer with the intent of evading the higher rate of duty, he had the right so to do. Applying the same rule to the case at bar we may say: If the importer packed not exceeding fifteen per cent of wrapper tobacco in a bale

with filler with the intent to evade the higher rate of duty the government could not complain, for congress intended he should have that privilege.

Decisions of the Board of General Appraisers construing tariff laws are entitled to great respect. The board takes a broad view of the whole subject and endeavors to construe the law so as to carry out the intent of the lawmaker, the primary object of which is to produce revenue for support of the government. When called upon to construe such statutes as applied to any commodity, the board is upon the ground, it has a view of the whole subject and the surroundings and it is practical and not simply theoretical in regard to the purpose and scope of the statutes. In this respect it is in a position somewhat similar to a trial court which has seen the witnesses, heard them testify and upon their testimony has determined a question of fact. On an appeal from a decision of this kind the Appellate Court looks with great favor upon the determination by the trial court of a question of fact. This is placed upon the ground that the trial court has seen the witnesses, heard the testimony and was able to judge as to the facts in the case. Although the Board of General Appraisers do not occupy precisely this situation in regard to importations of products of the earth, it has very much the same relation to the transactions that a trial court has in determining a question of fact from oral testimony.

The unbroken line of decisions by the Board to the same effect, under various acts, should have great weight with the court in this case. Not less than eleven times has the Board determined this precise question prior to its decision in this case. It is noteworthy that there has never been but one decision of any court to the contrary, Stachelburg v. States, referred to above.

The Circuit Court of Appeals has also in two cases placed the same construction upon statutes as we contend for here.

When we come to the practical application of the law to existing conditions we find the following result. An importer can afford to pay wrapper duty on bales in which the greater portion is wrapper tobacco, although he cannot afford to pay wrapper duty on bales where the wrapper tobacco in a bale is slightly above fifteen per cent. No such bale would ever be imported, except as a part of a heavy shipment, and then it would be by accident. Every importer will endeavor to import all wrapper tobacco in bales by itself. He will endeavor to have every leaf in every bale suitable for wrapping cigars. Although this has been and is the purpose of importers, yet no such tobacco is imported as it is practically impossible to so classify it. That is, so as to have every leaf in every bale suitable for wrapper. Tobacco as packed from the plantation cannot be classified so as to tell absolutely, which is wrapper and which is filler. In a question of doubt the honest dealer, in packing his tobacco, must, necessarily, place the doubtful hands in with filler. Unless he does this he is obliged to pay wrapper duty on it, although it may be filler. If, with an honest purpose and acting upon good judgment, the doubtful hands are placed in filler bales he expects when the tobacco is examined that it will be done with some judgment. The government in its instructions has directed collectors to examine it with judgment; and, under the McKinley act, where the provision was that if *any* tobacco was found in a bale suitable for wrapper, the whole bale was to be classed as wrapper, the government had given specific instructions that *some* wrapper tobacco was permissible without reporting it for wrapper duty. The government had said in its letter of instructions that unless the law was thus construed all

filler tobacco would be excluded. When the present law was enacted Congress had the whole history of this subject before it and determined that the limitation of wrapper tobacco in a mixed bale should be fifteen per cent.

Referring again to the circular No. 14,423, wherein the Treasury Department gave instructions upon this precise question, and calling the court's attention to the fact that, undoubtedly, Congress had this circular before it when it formulated the tobacco provisions of the Act of 1897, we say that the court should construe this statute in the same spirit and hold that,

The bale is the unit, and

That the tobacco suitable for wrapper, if fifteen per cent. or less in a mixed bale, is assessable as "filler to "bacco not specially provided for in this act."

The decision, therefore, should be that the two questions certified should be answered in the negative.

H. J. COOKINHAM.

Of Counsel for Appellants.

No. 298. 59

Brf. of Atty. Gen'l. (Wells) for U.

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Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 298.

ROTHSCHILD & BROTHER,
Appellants,
against
THE UNITED STATES,
Appellee.

On a Certificate from the United States Circuit Court of Appeals from the Second Circuit.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

I.—The certificate states the facts.

II.—The two questions submitted should both be answered in the affirmative.

1. It is the meaning of the Tariff Act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package.

2. It is the meaning of said act to subject to the duty of $1.85 per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety, at the date of the enactment, were commercially known in this country as "filler tobacco," and bought and sold by that name, notwithstanding such leaves constitute less than fifteen per centum of the contents.

The Law.

The law under which the Collector justified his proceedings is known as the Dingley Tariff Act of July 24th, 1897, and the paragraphs of that law applicable to duties on tobacco are as follows:

213. Wrapper tobacco, and filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, and all leaf tobacco, the product of two or more countries or dependencies, when mixed or packed together, if unstemmed, $1.85 per lb.; if stemmed, $2 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35c. per lb.; if stemmed, 50c. per lb.

214. The term wrapper tobacco, as used in this act, means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco.

Collectors of Customs shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, *of any leaf tobacco*, unless the invoices of the same shall specify *in detail* the character of such tobacco, whether wrapper or filler, its origin or quality.

In the examination for classification of any imported leaf tobacco, at least one bale, box

or package in every ten, and at least one in every invoice, shall be examined by the Appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box or package.

215. All other tobacco, manufactured or unmanufactured, not specially provided for in this act, 55c. per lb.

(For brevity figures have been used and "per lb." substituted for the written words in the text of the act).

The Decision Appealed From.

The General Appraisers, by a divided court, overruled the action of the Collector, and held that because the per cent. of wrapper tobacco in each bale was less than 15%, the Collector should have ignored the presence of wrapper tobacco in the bales, and entered them as bales of filler tobacco, subject only to an impost duty of 35cts. per lb.

This decision was reversed by the Circuit Court, and from the latter decision the appeal to the Circuit Court of Appeals was taken by the Importers.

On the Construction of Statutes.

At the outset it is proposed to discuss some elementary principles governing the construction of statutes, and then to take up the history of tariff legislation and the decisions of the courts, from 1883 until the enactment of the present law, on the subject of leaf tobacco.

Says the Supreme Court of the United States, in U. S. *v.* Union Pacific R. Co., 91 U. S., 72:

> "Courts, in construing a statute, may, "with propriety, recur to the history of the

> "times when it was passed; and this is fre-
> "quently necessary in order to ascertain the
> "reason as well as the meaning of particular
> "provisions in it."

In the case of U. S. *v.* Oregon and C. R. Co., 57 Fed., 426, it was said that

> "in construing a statute the courts may
> "advise themselves as to the history of the
> "times and the general state of public, judi-
> "cial and legislative opinion of that period."

Says the Court of Appeals of New York, in People *v.* Supervisors Columbia Co., 43 N. Y., 130:

> "The occasion of the enactment of a law
> "may also be referred to in interpreting and
> "giving effect to it. The Court should
> "place itself in the situation of the Legis-
> "lature and ascertain the necessity and prob-
> "able object of the statute, and then give
> "such construction to the language used as
> "to carry the intention of the Legislature
> "into effect, so far as it can be ascertained
> "from the terms of the statute itself."

The Supreme Court of Louisiana, in the case of John Lake, Sh'ff, *v.* Parish Coddo, 37 La Annual, 788, held, that whenever light can be derived from such sources, the courts will take judicial notice of the facts of contemporary history, the prior state of the law, the particular abuse or defect which the act was meant to remedy, and the application of such state of affairs to the language which it employs. They will also, for this purpose, inform themselves as to such facts and circumstances by any and all available means.

The Supreme Court of Vermont, in Barker *v.* Esty, 19 Vt., 131, went so far as to declare that a known state of embarrassment resulting from the former law might be considered in determining the intention of the Legislature in enacting a statute.

Thus we have the Federal court of last resort; the State courts in New England and New York, where the common law prevails; and of Louisiana, where the civil law is the basis of their jurisprudence; all concurring upon the proposition.

It has been held that the rule of construction by the aid of prior statutes in *pari materia* is especially applicable in the case of revenue laws, which, though made up of independent enactments, are regarded as one system, in which the construction of any separate act may be aided by the examination of other provisions which compose the system.

U. S. *v.* Collier, 3 Blatch., 325.
In re So. Pac. Co., 82 Fed., 311-313.
Black on Interpretation of Statutes (1896), 206.

It is also true that in seeking the correct meaning of words and terms employed in an act to be construed, resort may be had to rulings upon former acts in *pari materia*, although they may have expired or been repealed. But it must be borne in mind always that this broad principle has certain limitations.

The elementary works and the cases cited in support of this general principle show clearly that, in announcing that expired and repealed acts in *pari materia* with the act to be construed, may be considered by the courts in seeking the correct meaning of words and terms employed in the act to be construed, the writers had particularly in view the general body of legislative enactments rather than those laws which formulate the governmental or revenue policy of a political party in power for the time being. Such laws are to be construed, rather by study of contemporaneous events, their reason and spirit, and in the light of the ascertained policy and purpose of their framers, than by reference to the language of statutes repealed by them, or

passed by others whose policies and purposes were antagonistic to, and have been overthrown by, the framers of the act to be construed.

The discussions of this subject by Maxwell and Black make it plain how dangerous it is, in seeking a true interpretation of the revenue measures of one political party, to "stick in the bark" of other and prior statutes, which, while they may relate to the same subject and are technically in *pari materia* (7 Com., 456), were framed with a different motive, purpose and meaning by an opposition party. For example, Black says, p. 504:

> "Later statutes are considered as supplementary or complementary to the earlier enactments. In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the continued modification and adaptation of the original design, to apply it to changing conditions or circumstances. * * * Secondly, the rule derives support from the principle which requires that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between different enactments," &c.

Maxwell (p. 46), treating of the same subject, says:

> "Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purpose of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs."

Both writers, in their illustrations of the general principle and the reason for its existence, show

plainly that its application was chiefly considered by them with reference to non-political laws, as contradistinguished from those embodying the legislative policy of a dominant political party.

Touching the former, we may reasonably expect, in new laws, provisions supplementary or complementary to earlier enactments. So also may we expect to find the progressive development of a uniform and consistent design; and concerning such, it is correct to apply the principle which seeks to avoid repugnancy or inconsistency between enactments. So, too, concerning the former class of laws, we should, for purposes of construction, consider them as forming one homogeneous and consistent body of law, each explaining and elucidating every other part of a common system.

But when it comes to construing the latter class of enactments, how absurd such canons of construction are.

Are the high-tariff measures of one political party to be construed by the free-trade enactments of another party, under the theory that they are in *pari materia?*

Is the one supplementary or complementary of the other?

Is the one the progressive development of the uniform and consistent design of the other?

Are we to seek to avoid repugnancy and inconsistency between the different enactments? Are we to consider the two as forming one homogeneous and consistent body of law, each explaining and elucidating every other part of a common system? If so, we are engaged in the task of "reconciling irreconcilables," and will soon reach an absurd result.

Why not recognize the indisputable fact that such legislation instead of being consonant with, or in furtherance of, the antecedent law, is more frequently opposed to it in spirit, in purpose and in language.

But, above all, let us not, in our anxiety to construe statutes by the language of other statutes in *pari materia*, lose sight of the well known principle governing statutory construction that. "Where "the language is sufficiently plain, the courts, in "construing that language, especially when they "know the purposes of the law-making power, "are bound to give the language the effect it was "intended to have."

Says Black:

> Although a statute "may be one of a series "or group, it may still be that the Legislature designs to depart from the general "purpose or policy of its previous enactments on the general subject; and if such "a design is unmistakably apparent on the "face of the act, it must be given effect. It "would be entirely erroneous in such case "to defeat the will of the Legislature by undertaking to reconcile the act with prior "statutes, or to control its terms by theirs. "Hence this rule of construction is to be "resorted to only in cases of doubt or ambiguity, or where the words, in their ordinary and *prima facie* signification, would "raise an undesigned conflict with previous "laws. It is not applicable when the statute is plain and unambiguous, and needs "no such aid to reconcile it with the existing body of laws.
>
> "In such cases there is no occasion to resort to any extrinsic circumstances to determine the meaning of the statute, nor is "it justifiable to do so. The Legislature "must be understood to have expressed its "meaning in the words employed. It would "be a perversion of the rule to apply it for "the purpose of defeating the plainly expressed will of the legislative body. And

"although statutes relating to the same "subject are to be construed together, this "rule does not go to the extent of control- "ling the language of subsequent statutes by "any supposed policy of previous ones."

Black on Interp. of Laws (1896), p. 209, and cases cited:

"If the language of the statute is plain "and free from ambiguity, and expresses a "single definite and sensible meaning, that "meaning is conclusively presumed to be "the meaning which the Legislature intended "to convey. In other words, the statute "must be interpreted literally."

Black on Int. of Laws (1896), p. 36, and cases cited:

"In the construction, both of statutes "and contracts, the intent of the framers "and parties is to be sought *first of all* in "the words employed, and if the words are "free from ambiguity and doubt, and ex- "press plainly, clearly and distinctly the "sense of the framers of the instrument, "there is no occasion to resort to other "means of interpretation. It is not allow- "able to interpret what has no need of in- "terpretation, and when the words have a "definite and precise meaning, to go else- "where in search of conjecture in order to "restrict or extend the meaning" (*Ibid.*, pp. 36, 37).

"When an act is expressed in clear and concise terms, and the sense is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally present. To go elsewhere in search of conjectures, in order to find a different meaning, is not so much to interprete the statute as to elude it" (Vattel L. N. Bk., 2, c. 17, s. 263).

"The object of interpretation is to bring sense out of the words used, and not to bring a sense into them" (McCluskey *v.* Cornwall, 11 N. Y., 593-601).

So much for the present concerning construction by reference to statutes in *pari materia*.

Having thus laid the foundation for enquiry into the history of this tariff legislation, and having shown that there are some circumstances under which reference to the language of or decisions under statutes in *pari materia* are unnecessary, dangerous and even absurd, let us now examine the acts, their legislative and judicial history, the language of the present law, and its ordinary meaning, and whether that meaning is to be interpreted away by the construction placed upon the language of other acts which are brought in by visionary theories of "*pari materia*."

How the Statute is to be Construed.

Tariff laws in general, and the law in question in particular, according to many decisions of the Federal courts, are not subject to a restrictive interpretation. but should be construed with fairness and justice, and in a manner such as to make them accomplish the purpose designed.

Revenue laws are not considered as penal statutes to be construed most strongly against the Government and in favor of the citizen.

Black on Interp. of Laws, (1896), pp. 329-30

They should be construed in such a manner as most effectually to accomplish the intention of the Legislature in enacting them (Taylor *v.* U. S., 3 How., 197-210).

Cliquot's Champagne, 3 Wall., 114.

Legislative intention is the guide to true judicial interpretation.

2 Abb. U. S., 305; 7 Blatchf., 459; 2 Bened, 63; 1 Abb. U. S., 275; 6 Biss., 379; Crabbe, 356, *Ib.* Fed. cases No. 16, 563; 5 Bened, 220; 133 U. S., 1; 10 Wal., 395, 406; 23 Wal., 374, 380.

The History of the Tariff Acts Since 1883, Concerning Tobacco.

The Act of 1883 (U. S. Stat. at Large, Vol. 22, p. 488, Mch. 3d, 1883, p. 503) imposed duties on tobacco as follows:

246. Leaf tobacco of which 85% is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, 75c. per lb.; if stemmed, $1 per lb.

247. All other tobacco in leaf, unmanufactured, and not stemmed, 35c. per lb.

Tobacco, manufactured, of all descriptions, and stemmed tobacco, not specially enumerated or provided for in this act, 40c. per lb. Snuff and snuff flour, manufactured of tobacco, ground, dry or damp, and pickled, scented or otherwise, of all descriptions, 50c. per lb. Tobacco, unmanufactured, not specially enumerated or provided for in this act, 30% *ad valorem.*

It will be observed that in this act there was no reference to "fillers." Nor was any tobacco designated as "wrappers" *eo nomine.* Leaf tobacco was divided, for taxation, into classes, viz.:

1. Leaf tobacco of which 85% was of requisite size and of *necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves were required to weigh a pound.*

2. All other tobacco in leaf, unmanufactured and not stemmed.

3. Tobacco manufactured of all descriptions, and stemmed tobacco, not specially enumerated.

It was the manifest purpose to tax leaf tobacco, and that of the finer grade, high. The law was clumsily drawn. The first question left open was, How is the 85% referred to in the first classification to be determined?

The question was first reached in the Supreme Court of the United States, 1890, November 24th.

Falk *v.* Robertson, 137 U. S., p. 225.

Then it was that the Supreme Court, construing the act of 1883, gave definitions of wrappers, fillers and binders (p. 231):

"Wrappers" are leaves suitable for the outside finish of a cigar.

"Fillers" are leaves that make up the main body of the cigar.

"Binders" are the secondary or inside wrapper and hold together the loose material which constitutes the filling.

It is important to note that two months prior to this judicial definition of the different grades of leaf tobacco, in litigation arising under the act of 1883, a new tariff law had been enacted. It was passed October 1st, 1890, and is known as the McKinley law. In due time we will examine its provisions. It is only proposed now to call attention to the fact that even the McKinley law did not designate leaf tobacco as "wrapper" or "filler." It only spoke of "*leaf tobacco suitable for cigar wrappers*" as taxable at one rate, and "all other tobacco in leaf, unmanufactured," as subject to another rate. Until Falk *v.* Robertson was decided in November, 1890, the terms "wrapper" and "filler" were not used in the tariff acts; for indeed, there was no authoritative statement of the meaning of those terms.

In Falk *v.* Robertson, the Supreme Court, construing the act of 1883 and its indefinite phraseology, not only determined the meaning of the terms above referred to, but went further. It declared that prior to the passage of the act of 1883 the various grades were applied to different uses; were bought and sold under their several names, and were of different value in the market, "*and prior to that time bales of leaf tobacco in the trade were as a rule homogeneous as to their contents, each one consisting of only one of these three classes.*"

This is an important historical fact which must be borne in mind. If bales were packed prior to the tariff act of 1883, so that, as a rule, their contents were homogeneous; and if, after the act, importers began to intermingle grades in packing, was there a reason for it connected with the tariff? That such was the fact was demonstrated in the case then before the Court.

Congress, in its effort to reach the high grade of leaf tobacco and tax it at a high rate, an effort apparent in all the tariff acts of this country, England and other countries, declared, in the act of 1883, "Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound," should pay the high rate, and all other tobacco in leaf, unmanufactured and not stemmed, should pay the lower rate.

This language was evidently based upon knowledge that up to that time the bales of leaf tobacco in the trade were as a rule homogeneous as to their contents, each one consisting of leaf tobacco of its class.

The lawmaker evidently failed to realize the invitation he gave importers to blend a little over fifteen per cent. of the lower grade with a little less than eighty-five per cent. of the higher grade, and there-

by escape a tax of $40 on every one hundred pounds imported.

The importer promptly accepted this invitation, and made the issue in the Falk case, which was the first decided. Bales of leaf tobacco, consisting exclusively of high grade wrappers shipped to Holland, were opened in Holland, low grade tobacco to about seventeen per cent. of the total contents of the bales were inserted in layers, in Holland, and the bales, thus composed, were imported into the United States, the importers claiming that, as the bales contained less than 85% of the higher grade, they should only be assessed at the lower rate. In the argument of this case in the court below, counsel for the importers, ignoring the facts in the Falk case, said that the importers had nothing to do with the way in which tobacco was packed, and that the packing was done on plantations without regard to importation. The device was, of course, not sustained. But the pendency of a suit, based upon this contention, must have been known to the framers of the law of October 1st, 1890, and the language of that law, when we come to consider it, must be construed in the light of the knowledge of this and other suits, possessed by the framers of the law of 1890.

The Supreme Court, in Falk *v.* Robertson, not only defined wrappers, fillers and binders and decided against the importers, but in construing the law of 1883, used the following language:

> "They (plaintiffs) contend that the unit upon which the 85% is to be calculated is the entire bale. But we cannot agree with this view. *The statute does not refer to tobacco in bales. It does not say that the 85% is to be 85% of the contents of a bale, but the duty of 75c. per lb. is imposed on any quantity of leaf tobacco* of the specified quality and weight, if not stemmed.

"The unit of the statute, therefore, must be held to be leaf tobacco wrappers answering the description which, when reaching the named percentage, is subject to the duty of 75c. per lb.

"There is nothing in these provisions" (of the act of 1883) "which shows that the 85% in question is to be regarded as meaning 85% of the entire contents of a package containing separable and separated quantities of leaf tobacco of two different qualities and subject to two different duties" (p. 233).

Two months before this decision the McKinley bill was passed, making a radical change in the law, but before taking it up let us consider other decisions under the law of 1883 in cases which arose before its repeal.

For the purposes of this argument they may be considered as if they had all been rendered before the act of 1890 was passed.

In April, 1893, the Circuit Court of the United States, Southern District of New York, decided the case of United States *v.* Blumlein, LV Fed. Rep., p. 383; S. C., 5 C. C. Rep., p. 142. In this case the importers had profited by their experience in the Falk case, and had blended the high and low grade tobacco in the bales imported.

The decision turned upon the method of classification, under the act of 1883, of tobacco thus blended in the bales. The decision rendered, while it has no application to the case, as I shall endeavor to demonstrate hereinafter, is, in my humble judgment, irreconcilable, either in argument or in conclusion, with that in the Falk case.

In the Blumlein case it is said that the statute "plainly contemplated the importation of tobacco in mixed grades, although the Supreme Court had said in the Falk case, 'Prior to that time (the pas-

sage of the act of 1883) bales of leaf tobacco in the trade were, as a rule, homogeneous as to their contents, each one consisting of only one of these three classes.'"

In the Blumlein case the Circuit Court said: "*The tariff does not impose the higher rate of duty upon all tobacco of the requisite size, fineness and weight*, but upon tobacco of which 85% is of the higher grade," although the Supreme Court, in the Falk case, had said, "*The duty* of 75c per lb. *is imposed on any quantity of leaf tobacco of the specified quality and weight.*"

In the Blumlein case the Circuit Court said that the bale was the proper unit on which to regulate the rate of duty by the ascertainment of the percentage of higher and lower grades of tobacco *in a bale*, although the Supreme Court, in the Falk case, speaking of the same act, said,

> "*They* (*plaintiffs*) *contend that the unit* upon which the 85% is to be calculated *is the entire bale*, *But we cannot agree with this view.* The statute does not refer to tobacco in bales * * * *the duty* * * * *is imposed on any quantity of leaf tobacco of the specified quality and weight, if not stemmed.* The unit of the statute, therefore, must be held to be leaf tobacco wrappers, answering the description which, when reaching the named percentage is subject to the duty" (p. 233).

In November, 1894, the Supreme Court of the United States again construed the act of 1883.

Erhardt *v.* Shroeder, 155 U. S., p. 124.

On p. 132 the Court said:

> "Diverse views were entertained * * * whether the bale was to be treated as the

unit to which the percentage test was to be applied, or whether the characteristics of the tobacco were to be ascertained by examining a number of representative hands, * * * and if certain of the examined hands should be found to be dutiable at one rate and the others at a different, the bale should be assumed to contain tobacco of two different grades, and the duties laid accordingly. *The proper answer to this question seems to depend upon the particular circumstances of a given case.*

It appears in the testimony on both sides of this case that leaf tobacco is divided into two classes, known as the wrapper class and the filler class.

Whether or not a bale of tobacco is of uniform character seems to be easily ascertained. If, then, *a bale* or other separate and concrete quantity of leaf tobacco, *contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale or other separate collection would be the unit.* * * *

On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

Particular attention is called to this language of the Supreme Court, used deliberately and in full knowledge of the language of the Circuit Court in the Blumlein case.

And attention is called to it in connection with the language of the majority of the General Appraisers in this case.

P. 3: "The courts have held that, under paragraphs 246 and 247 of the tariff act of 1883, above cited, that the unit of leaf tobacco, for dutiable purposes, as 'wrapper'

> or 'filler,' was the commercial bale." And again,
>
> P. 5: "The 'commercial bale' of leaf tobacco, honestly packed, is still the unit for dutiable purposes."

Is it true that any courts have held, under the paragraphs referred to, that the unit of leaf tobacco, as "wrapper" or "filler," was the commercial bale?

We have already demonstrated that the classification of leaf tobacco as "wrapper" or "filler" was not made in the Act of 1883, or even in the Act of 1890, or until the Act of 1894. The language used is therefore inaccurate in so far as it describes any court as measuring "wrapper" or "filler" tobacco by the bale as a unit.

It is not less inaccurate in its statement that *the courts* have held, under paragraphs 246 and 247 of the Act of 1883, that the unit of leaf tobacco, for dutiable purposes, was the commercial bale."

What courts are *the courts?* Surely the Supreme Court is *the court*, if any court is such. When and where has *it* held that, under paragraphs 246 and 247 of the Tariff Act of 1883, the unit of leaf tobacco for dutiable purposes is the bale? In the Falk case it rejected in terms the contention of the importers that, under the Act of 1883, the bale was the unit. In the Shroeder case, which is its last expression on the subject, it referred to the diverse views on the question whether the bale was to be treated as the unit, and concluded that, if the bale contained only leaves of uniform character, it would be the unit, but that if it contained tobacco of two classes, "the unit would be the ascertained quantity of either class."

In the presence of statements so boldly made, it is well to examine this decision in Erhardt *v.* Shroeder, for the Supreme Court in that case, in

general and in detail, repudiated the construction placed upon the act by the Circuit Court in the Blumlein case.

In Erhardt *v.* Shroeder the Supreme Court decided that where ten hands of leaf tobacco were taken from a bale for examination, it was essential, in order to assess the tax upon wrappers, that, for every pound of leaf tobacco contained in such hands, there must be at least one hundred leaves. If the examination showed that the ten hands weighed four pounds, there must be contained therein at least four hundred leaves in order to bring the tobacco under the wrapper class as to the weight required by paragraph 246 of the Act of March 3, 1883.

The Court also held that if the whole ten hands were opened and examined, leaf by leaf, and it was found that eighty-five half leaves, out of every one hundred half leaves, contained in this mass were suitable for wrappers (that is to say, that each half leaf will make at least one wrapper), then the whole mass was dutiable as wrapper tobacco under the requirements of paragraph 246 as to size and fineness of texture.

The Court further held that if the ten hands weighing four pounds, contained four hundred leaves, of which more than 85 per cent. of the half leaves were suitable for wrappers (that is to say, that out of the 800 half leaves, 680 or more are suitable for wrappers), then all of said ten hands were to be classed as wrapper tobacco within the meaning of paragraph 246, and the entire lot, or the ten bales that these ten hands represent, were dutiable as wrapper tobacco at the rate of 75 cents per pound.

In the Shroeder case, the examined bale (being a representative bale out of a lot of ten bales) weighed 179 pounds, 125 of which were classified as wrapper tobacco at 75 cents per pound, and the re-

maining 54 pounds as filler tobacco at 35 cents per pound, the percentages being in this case 70 per cent. of wrapper and 30 per cent. of filler tobacco. It was contended on behalf of the importers that, inasmuch as the bale did not contain 85 per cent. of leaf tobacco suitable for wrappers, the whole bale was only dutiable at the 35 cent rate. This claim was in accordance with the ruling of the United States Circuit Court of Appeals in the Blumlein case, wherein the Court held that the bale was the unit, and that unless 85 per cent. of the tobacco contained in the bale was suitable for wrappers, the whole bale was only dutiable at the rate of 35 cents per pound. The Supreme Court flatly overruled this construction, holding that inasmuch as the importers had failed to prove, by competent testimony, that for every pound of leave tobacco contained in said bale of 179 pounds there were *not* more than 170 half leaves suitable for wrappers, every pound of which contained at least one hundred whole leaves, the high rate must be paid.

In this connection it must be remembered that it was the practice in examining leaf tobacco to take ten hands, which were examined separately, hand by hand, for the purpose of ascertaining whether 85 per cent. thereof was suitable for wrappers, and of which it required 100 leaves or more to weigh a pound. It was not the practice, as suggested by the Supreme Court in the Shroeder case, to separate the hands (that is to say, to cut them open), so as to have but one general collection of leaves, under examination. To have cut open the separate hands would have injured them commercially. The examining officer, therefore, made his examination, hand by hand, so that if seven hands out of the ten hands were found to contain leaf tobacco suitable for wrappers, meeting the requirements of paragraph 246, and the remaining three hands to contain leaf tobacco not fulfilling the

wrapper requirements, then seven hands would be classified as wrapper tobacco and three hands as filler tobacco; and, therefore, if the ten hands represented one bale out of ten, 70 per cent. of the bale was classified as wrapper and 30 per cent. as filler, so that if the one bale contained 100 pounds, 70 pounds thereof were charged with duty at 75 cents per pound, and the remaining 30 pounds assessed for duty at 35 cents per pound.

As was stated by the Supreme Court, in the Shroeder case, it does not follow that because the Appraiser's return showed that the examined bale in that case contained 125 pounds of wrapper tobacco and 54 pounds of filler tobacco, being 70 per cent. and 30 per cent. respectively, that not more than 85 per cent. of half leaves were of the requisite size, fineness of texture and weight, to come within the description for wrapper tobacco as contained in paragraph 246. In fact, it was admitted by the importer in that case that out of five bales covered by that suit, more than 85 per cent. of the leaves were suitable for wrapers.

What courts did the General Appraisers refer to then, when they used the language above quoted?

The only other decision upon the subject is another decision of the Circuit Court for Southern District of New York, rendered March 5th, 1895.

United States *v.* Rosenwald, 67 Fed. Rep., p. 323.

This case is only valuable as showing a hopeless effort of the Circuit Court to reconcile its decision in the Blumlein case with the decisions of the Supreme Court in the Falk and Shroeder cases, and to maintain the bale as the unit under the Act of 1883 in the face of the decisions of the Supreme Court to the contrary.

Let it be remembered that all these decisions and all this conflict arose on the construction of the

Act of 1883, and the peculiar phraseology of that Act. There are no decisions, save by the General Appraisers, on the question of what is the unit under the three subsequent acts. How loose, therefore, is the language of the opinion: "The courts have held * * * * that the unit * * * was the commercial bale." And as every one of these cases arose under, and only considered, the Act of 1883, the language of which is different from that employed in three subsequent tariff laws not construed, what warrant is there for assuming, as was done by the General Appraisers, that the "commercial bale" of leaf tobacco "ever was," or "is still," the unit for dutiable purposes under any of these acts?

Even before the first of these conflicting decisions was rendered the Act of 1883 was repealed.

The McKinley law, enacted October 1st, 1890, reads as follows:

U. S. Statutes at Large, Vol. 26, p. 567.

Passed October 1st, 1890.

Page 585.

242. Leaf tobacco, suitable for cigar wrappers, if not stemmed, $2 per lb. Provided, that if any portion of any tobacco imported in any bale, box or package, or in bulk, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box or package, or bulk, shall be dutiable; if not stemmed, at $2 per lb.; if stemmed, at $2.75 per lb.

243. All other tobacco in leaf unmanufactured and not stemmed, 35c. per lb.; if stemmed, 50c. per lb.

Can any one doubt, upon reading it, that the framers of that law knew of the contentions of the

importers under the Act of 1883, as shown in the cases above cited?

Can any one doubt the purpose of that act to reach every pound of leaf tobacco imported, suitable for cigar wrappers, and tax it at the high rate?

Can anybody doubt the purpose of the framer of that law to force importers back to the method of packing the different grades separately, as had been done prior to the passage of the Act of 1883? Back to the old-time honest way of packing instead of the evasive methods resorted to since the passage of the Act of 1883.

Let it be remembered also, when we invoke the aid of acts in *pari materia* in construing the Dingley bill, that the McKinley bill of 1890 and the Dingley bill of 1897 are the bills prepared and enacted by the Republican party with views and purposes very different from the intervening act of a Democratic Congress, passed in 1894, known as the Wilson bill; and that no Republican tariff measure ought to be emasculated by making it dependent for its construction upon the construction placed upon Democratic tariff measures. It undoubtedly had a different theory as its basis, a different motive in its framing, and should have a different rule for its interpretation and enforcement. The McKinley bill taxed every imported leaf of tobacco suitable for cigar wrappers, unstemmed, at $2 per lb. wherever found. That was its plain purpose. So plain that there was no evading it. Its framers knew the importers' trick of mixing grades, and the act provided that if any portion of any tobacco in any bale, box or package, or in bulk, was found suitable for cigar wrappers, the entire quantity should be taxed as wrapper.

Here we have the Republican animus. So distinct that Judge Coxe, in the only case which arose

under the McKinley law, pronounced the language to be too plain for argument.

> Stachelburg *et al. v.* U. S., 72 Fed. Rep., 50. Decided Feb'y 12th, 1896.

Nor did the General Appraisers, in construing the McKinley act, find any excuse for displaying their perpetual infatuation with the bale as a unit. The language of the McKinley act was:

> "If *any portion of any tobacco* in any *bale, box or package, or in bulk*, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such *bale, box or package, or bulk*, shall be dutiable."

In the face of that language the opinion delivered in this case says, speaking of the McKinley act: "The bale or package being still regarded as the unit, or an entirety, for tariff purposes."

It is respectfully submitted that no such deduction can be legitimately drawn from the language quoted. All that can be said is, that wherever tobacco, suitable for cigar wrappers, formed a portion of any mass imported as an entirety, the whole should be classified as wrapper tobacco. For convenience of description it referred to bales and packages. It also referred to boxes and bulks. Why were bales or packages made the unit, by this reference, any more than boxes or bulks of tobacco? Yet, to carry out their theory, the General Appraisers seized on the references to tobacco in bales and packages, and ignored the reference to tobacco in boxes or in bulk.

Again, in order to maintain its untenable theory, the Board of General Appraisers said:

> "Congress seems to have dealt with tobacco importations upon the theory that a margin of fifteen per cent. would be just and ample."

Is that true of the McKinley bill? Certainly not.

In the light of the McKinley bill, is it not loose talk, indulged in to bolster up a false theory? We shall see when we come to consider the other acts.

The Republicans, the high tariff party, were defeated in 1892.

The Democrats, the low tariff or "tariff for revenue only" party, regained control in Congress. The Congress of 1893-5, under the leadership of Mr. Wilson, enacted a new tariff law August 28th, 1894.

The provisions of that act, bearing upon leaf tobacco importations, were as follows:

WILSON BILL,

U. S. Stat. at Large, Vol. 28, p. 509,

August 28th, 1894.

Page 522.

184:

Wrapper tobacco, unstemmed, imported in any bale, box, package or in bulk, $1.50 per lb.; if stemmed, $2.25 per lb.

185:

Filler tobacco, unstemmed, imported in any bale, box, package or in bulk, 35c. per lb.; if stemmed, 50c. per lb. Provided, that the term wrapper tobacco, whenever used in this act, shall be taken to mean the quality of leaf tobacco known commercially as wrapper tobacco.

Provided further: That the term filler, whenever used in this Act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco.

Provided further: That if any leaf tobacco, imported in any bale, box, package or in bulk, shall be growth of different countries, or shall differ in quality or value, same as provided in the succeeding provision, then

the entire contents of such bale, box, package or in bulk, shall be subject to the same duty as wrapper tobacco.

Provided further: That if any bale, box, package or bulk of leaf tobacco, of uniform quality, contains exceeding 15% thereof of leaves, suitable in color, fineness of texture and size for wrappers for cigars, then the entire contents of such bale, box, package or bulk shall be subject to the same duty as wrapper tobacco.

Provided further: That collectors shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, of any leaf tobacco imported in any bale, box, package or in bulk, unless the invoices covering the same shall specify in detail the character of the leaf tobacco in such bale, box, package or in bulk, whether wrapper or filler tobacco, Quebrado, or self-working bales, as the case may be. . . . . .

1864:

Tobacco, manufactured or unmanufactured, of all descriptions, not specially enumerated or provided for in this act, forty cents per pound.

For the first time a tariff statute described wrapper tobacco "*eo nomine*." It was the first enactment on the subject since the decision of the Supreme Court in Falk *v.* Robertson, *supra*, had given a judicial interpretation of the meaning of the term "wrappers," viz., "leaves suitable for the outside finish of a cigar." The proviso declared that the term wrapper tobacco meant the quality of leaf tobacco, *known commercially* as wrapper tobacco. As the Supreme Court had held that the commercial meaning of the term, wrapper tobacco, was "leaves suitable for the outside finish of a

cigar," it is demonstrated that by the Wilson act the tax was imposed as follows:

184.

> Leaves suitable for the outside finish of a cigar, unstemmed, in any *bale, box, package* or *in bulk*, $1.50 per lb.; if stemmed, $2.25 per lb.

One would think this language too plain to admit of any doubt. *Leaves* were the subject of taxation. If they were suitable for the outside finish of a cigar, they were to be taxed. It made no difference where they were found, or whether in bales or boxes or packages or in bulk. As to this character of leaves, there was no qualification concerning their being packed separately or with leaves of another character, and there was no sort of reservation omitting such leaves when discovered because the per cent. of tobacco of another quality with which they might happen to be found commingled was large or small.

They were taxed, whether in bales, boxes, packages or in bulk, and whether commingled or not commingled with leaves of a different character.

Says Black, p. 85:

> "Words should never be *supplied* or changed in a statute unless to effect a meaning clearly shown by the other parts of the statute, *and to carry out an intent somewhere expressed.*"

Lam *v.* Schomp, 20 N. Y. Eq., 82.

It is as untrue of the Wilson bill as it is of the McKinley bill, that in levying a duty upon leaves suitable for the outside finish of a cigar, Congress proceeded upon the theory that a margin of fifteen per cent. of such leaves might be ignored or overlooked.

No margin of *such leaves* was ignored or overlooked, whether they were found in a bale, in a box, in a package, or in a bulk, or whether they were found commingled or not commingled with others.

Herein was the difference between the McKinley Act and the Wilson Act, and the Act of 1883. In the Act of 1883 the determination whether leaf tobacco fit for wrappers should be classified for taxation at the high rate or the low rate was made dependent upon the question whether 85% of the bulk in which it was shipped was of the requisite size, &c. That necessitated considering such leaves as part of a mass of which they were a component part, and involved the ascertainment of some unit whereof they constituted a per cent.

No such reservation is made in the McKinley or the Wilson Acts. In both Acts, "leaves suitable for the outside finish of a cigar," are taxed whenever imported, and however imported, and whether imported separate or in association with tobacco of a different grade. To hold otherwise is to violate the cardinal principle of Statutory Construction last cited, and to supply words to the statutes not called for by any meaning or intent shown elsewhere in the statute.

It is true that the Wilson bill relaxed the rigor of the McKinley bill somewhat in respect to other tobacco than wrapper tobacco. But the modification relates to other tobacco exclusively, and does not refer to wrappers.

The act contained a proviso that if any bale, box, package, or bulk of leaf tobacco of uniform quality contained, exceeding 15% thereof of leaves suitable in color, fineness of texture, and size for wrappers, *then the entire contents* should be subject to same duty as wrapper tobacco.

The McKinley bill had provided that if any portion of any tobacco imported in any bale, box, or

package, or in bulk, was suitable for cigar wrappers, the entire contents should be dutiable as wrappers.

The amendment of this in the Wilson bill did not impose the higher rate on the entire contents, unless the proportion of wrappers exceeded 15% of the bale, box, package or bulk. If the wrappers did exceed 15%, then *the entire contents* should be subject to the *same duty as wrapper tobacco.*

Did this release wrappers from wrapper tax if they did not amount to 15% of the contents? By no means. The tax on wrappers was fixed whether they amounted to 1% or 100% of the contents. It was only the tax on the other tobacco which was affected by the proviso which allowed a certain amount of wrapper in the bale, without subjecting the whole bale to the wrapper rate. It was not the object of the proviso to release any wrapper tobacco from taxation under any conditions, but to modify a penalty theretofore placed upon other tobacco, under certain conditions, by reason of its being packed with wrapper tobacco.

There was a reason for this modification; and it was not a reason which appealed for any release of tax on any per cent. of wrapper tobacco wherever it might be found. The concession based upon the idea that there was no fraud and no impropriety in admitting wrappers packed with fillers, where the wrappers did not exceed 15% of the entire contents.

That such was the reason of the modification is shown by the next proviso of the Wilson Act.

That proviso required special entry under treasury regulations, and that the invoices of leaf tobacco should specify in detail when Quebrados, or self-working bales were imported. Quebrado is simply torn leaf. A self-working bale is a bale of tobacco so packed that it may be sold to the cigar-maker, and he may take it to his shop and upon opening it find in it about the requisite proportions

of wrapper and filler.—Synopsis of Treasury Department, 15,586 G. A. 2846, Dec. 27th, 1894. The proportion of weight of wrapper to filler in a manufactured cigar is something less than 15%.

The small dealer finds it more convenient and within his means to buy these self-working bales, than to buy a bale containing nothing but wrappers, for the working up of which he would be compelled to buy at least seven bales of fillers. Such packages are of no importance to large concerns, but are put up for petty cigar manufacturers, and are a great convenience to them.

The appeal of these small dealers evidently had its effect with the framers of the Wilson law. With invoices specifying in detail the per cent. of leaf tobacco and tobacco of other grades in the self-working bales, the Government could secure its revenue on the wrapper tobacco contained in such bales, packages, boxes or bulks, and at the same time make itself popular with the large class of small dealers. The Wilson law limited the per cent. of wrappers in such bales to 15%, because that per cent. of wrapper was a liberal per cent. to allow for the manufacture of the remaining 85% of the package into cigars. The presence of a greater per cent. of wrappers in such self-working bales would be *prima facie* evidence that the wrappers in the bale, package, box or bulk were being brought in, not for the *bona fide* purpose of working up the fillers in that bale, but for use with other fillers.

Here we have a reason for this modification of the McKinley law by the Democrats in the enactment of the Wilson law. Even the Democrats have always admitted that cigars are a luxury, and that high tariff on cigar wrappers is a legitimate tax from which to raise revenue. Not a word appears in the Wilson bill releasing from taxation a pound of any per cent. of imported wrapper tobacco, wherever it may be found, or however it

may be imported. The only modification of the McKinley law, intented or enacted, was a waiver of the wrapper rate upon *other* tobacco packed with wrappers, unless the wrapper exceeded 15% of the package.

Yet this plain provision has been perverted by the reasoning of the Board of General Appraisers into an exemption from wrapper rates of wrapper tobacco packed with other tobacco, unless the wrappers in the package amount to 15% of the package.

If this is not supplying words and changing words in the statute it is nothing.

The Wilson bill passed August 28th, 1894. As early as December 27th, 1894, in the matter of Garcia & Co. (Synopsis of Dec., 1895, 15,586, G. A. 2,846) the General Appraisers considered the effect of Section 184 of the Wilson bill.

Three bales of tobacco had been imported while the McKinley bill was in force in June, 1894, and the Board of Appraisers had classified them as wrapper. They were then exported and re-entered September 1st, 1894. The Board found, as a question of fact, that self-working bales meant "such a bale as would furnish sufficient wrappers to work up the bale, using the remainder for filler." Speaking of such, it said: "These, although not commercially wrapper bales, if manufactured in their fresh condition, would produce a good percentage of wrappers."

Calling attention to the fact that between June, the date of the original entry, and September, the date of the re entry of the tobacco, the Wilson bill had gone into effect, wherein paragraph 185 enacts that "wrapper" tobacco should be taken to mean *the quality of leaf* tobacco *known commercially* as "wrapper," the Board conceded that the same merchandise, *under trade testimony*, might be properly classified differently under the two acts.

The Board apparently ignored the judicial ascertainment in Falk *v.* Robertson of the commercial meaning of wrappers (137 U. S., p. 231). The proviso says wrapper tobacco shall be taken to mean that *quality of leaf tobacco* known commercially as wrapper tobacco. The term "wrapper" was used for the first time in any tariff act by the Wilson bill, after the decision of Falk *v.* Robertson, and manifestly intended to adopt not only the term "wrapper," as used in that decision, but the commercial meaning of the term as it was defined by that decision.

What was "*the quality* of leaf tobacco known commercially as wrapper tobacco?" The Supreme Court had said in Falk *v.* Robertson:

"'Wrappers' are leaves suitable for the outside finish of a cigar," and declared such was the quality of leaf tobacco known commercially as wrapper tobacco, in the market.

The Board of General Appraisers were not, therefore, at liberty to introduce "trade testimony" to vary this definition. The language of the Wilson bill was the same as if it had read, "Leaves suitable for the outside finish of a cigar, unstemmed, imported in any bale, box, package, or in bulk, $1.50 per lb.; if stemmed, $2.25 per lb."

Upon the question of fact, and upon the testimony of skilled witnesses, two bales were held not to contain "that quality of leaf tobacco known commercially as wrapper." This ruling is unintelligible in the absence of the testimony, for these identical three bales had been held by the same Board June 13th, 1894, to be wrapper.

Concerning the third bale, the decision rendered seems even more fantastical.

The General Appraisers said they must give force to the fourth proviso of paragraph 185 of the Wilson Act. They speak of the fourth proviso as following the other proviso which they had referred

to. The Board had discussed the first and second provisos relating to "wrapper" and "filler." A *third* proviso declared that leaf tobacco imported in any bale, box, package, or in bulk, grown in different countries, or *differing in quality* and value, save as provided in the fourth proviso, should be subject to wrapper duties.

The *fourth* proviso imposed the wrapper rate upon the whole of any bale, box, package, or bulk, of leaf tobacco, of uniform quality, containing exceeding 15% of leaves of suitable color, fineness of texture and size for wrappers.

Now, the fourth proviso does not follow the proviso discussed by the Board, and, in the absence of the testimony, it is impossible to speak with certainty of the conclusions reached about the third bale.

The Board held it subject to the same duty as wrapper tobacco, *notwithstanding the fact that the evidence tended to show that this bale did not contain leaf tobacco known commercially as "wrapper tobacco."*

It is easy to see how the Board reached this conclusion if it was proceeding under the third proviso; the one that follows the other proviso. Under that it might have found that the tobacco in the bale was the growth of different countries, or differed in quality and value, and so was subject to wrapper rates, although not wrapper tobacco.

But the Board says: "In view, however, of the *fourth* proviso of said paragraph 185, to which force must be given to render the whole paragraph operative, and which follows the other proviso named above, and under all the testimony hereinbefore referred to, we find that bale 172 comes within the terms of said last mentioned proviso, and hold that it is subject to the same duty as wrapper tobacco, notwithstanding the fact that the evidence tended to show that this bale did not contain leaf tobacco known commercially as wrapper tobacco."

If the Board was indeed proceeding under proviso four, it must have found that the bale contained exceeding 15% of "leaves suitable in color, fineness of texture and size for wrappers for cigars," and that these were not "leaf tobacco known commercially as wrapper tobacco." This is an absurdity on its face, and in the teeth of the decision in Falk *v.* Robertson, *supra*, which declared the commercial meaning of wrapper tobacco to be "leaves suitable for the outside finish of a cigar."

The only sensible solution of the ruling is that the Board referred to proviso three, "which follows the other proviso" discussed by the Board.

The next ruling of the Board of General Appraisers upon the Wilson Act was made January 23d, 1895 (Synopsis 15,692, G. A., 2,873).

The El Paso Cigar Manfg. Co. imported certain leaf tobacco, unstemmed, October 6th, 1894, from Mexico through El Paso. The Collector examined a bale. 4% was found suitable for wrappers, and so rated. This was conceded to be a fact by the importers. The tobacco was conceded to be of uniform quality. The Collector held that wrapper tobacco was "dutiable, at such rate, wherever found in any quantity," and that "any bale containing wrapper tobacco in appreciable quantities, as in the case submitted, must be assessed at the rate determined in paragraph 184 for the wrapper contents." This was the correct construction of paragraph 184. But it was rejected by the Board as "ingenious."

The argument of the Board sustaining its contrary ruling was not ingenious, and was and is fallacious in its every branch.

Says the Board: "It is substantially a contention that, although there is no actual separation of the tobacco, it may be constructively separated by mentally grouping all the higher-grade tobacco into one lot, and all the lower-grade tobacco into another,"

and then jumps to the false conclusions that because this could not be done under the statute of March, 1883, it could not be done under the Wilson Act. This is a *non sequitur*. The absurdity of such conclusion appears by the attempt at demonstrating its correctness.

Says the Board: "Where, under the law, a percentage is to be calculated, there must be a unit on which the calculation is to be made." That is true, but where is any percentage to be calculated on *wrapper* tobacco under the Wilson law? And what unit must be referred to on which to make the calculation touching wrapper tobacco, under the Wilson law? There is none. There can be none. The language is, 184: "Wrapper tobacco, unstemmed, *in any* bale, box, package or in bulk, $1.50 per lb."

The words were equivalent by judicial determination to—

184:

> Leaves suitable for the outside finish of a cigar, unstemmed, in any bale, box, package or in bulk, $1.50 per lb.

The language made leaves the unit, their suitableness for the outside finish of a cigar the criterion, of the duty to be imposed; and leaves thus found were subject to the duty in any bale, box, package or in bulk, or howsoever they might be packed. Not a syllable in the Statute anywhere omitted any leaves of this sort, wherever they might be found, from payment of wrapper duty. The only reference thereafter in the act to wrappers, is to exempt fillers from the wrapper rate, when packed with not exceeding 15% of wrappers. This does not exempt wrappers from wrapper duty when found packed with more than 85% of fillers.

To so hold is to convert what was granted as a shield to fillers into a sword for wrappers. It is to declare 15% of wrappers exempt, by implication,

under certain circumstances, in the face of paragraph 184, which taxes all wrappers found *in any* bale, box, package or in bulk.

The statement that in the Blumlein case the Court held that the bale was a unit, under the law of 1883, has no bearing upon this question, and is calculated to mislead; and equally irrelevant was the statement that in that case, in construing the law of 1883, the Court held that duties could not be assessed according to the proportions of different qualities found in an entire lot.

The Act of 1883, in its method of ascertaining and reaching wrappers, was not analogous to the Wilson law. In the Act of 1883, the question whether leaf tobacco was to be rated high or low for taxation was made dependent upon whether 85% of the bulk in which it was imported was of requisite size and fineness to be suitable for wrappers. If 85% was of such size and fineness, then *the bulk was classed as other tobacco.* It all depended upon a per cent. in a bulk. The act did not define "wrapper" or "filler." It did not tax leaves of a designated quality wherever found, and in *any* bale, box, package, or in bulk, as wrappers. It determined the classification of a mass of leaf tobacco as an entirety by the per cent. of one grade or another found in it. This feature of the Act of 1883, and this alone, gave color to the never clearly-settled ruling in the Blumlein case, that under that particular act the bale was the unit, and that the constituent elements of the bale could not be separated for rating of taxation by mentally grouping the higher grade in one lot and the lower in another.

If that argument was applicable to the Wilson act, what was the sense of the requirement in proviso five that invoices should specify in detail the character of the leaf tobacco in such bale? * * * whether wrapper or filler tobacco, Quebrado, or "*self-working bale.*"

Why was a self-working bale, known as it is to contain both wrapper and filler, to be entered, with specification in detail, in the invoice of the character of tobacco it contained, unless it was to be taxed, so much as wrapper, so much as filler. Is it credible that the law intended to admit up to 15% of wrapper tobacco in all such bales, tobacco sufficient to work up the whole bale into cigars, and to allow it, although its character was specified in detail in the invoice, to pay only the filler duty?

It is incredible that such was the purpose. Why, under such a construction the importers need never pay another dollar of duty on wrapper tobacco. The 14½% of wrapper, admitted in every self working bale, was sufficient to work up all the filler in the bale. The argument that only 4% of wrappers was in the bale is of no weight. The principle is the same whether the per cent. was 4 or 14.

If, because the wrapper tobacco in the bale is less than 15% of its contents, it is admitted as filler, the revenue of the Government on leaf tobacco is gone. The importer having established the principle on the small per cent. will increase his per cent. to its highest limit and need pay no more wrapper duties.

The construction is fatal to revenue.

Says Maxwell:

> "A construction which facilitates the evasion of a statute will be avoided."
>
> Maxwell Interp. of States (1896), p. 272.

Says Black, p. 27:

> "It is not permissible to construe into nothingness a provision merely because it may appear to work injustice, * * * and still less weight should be attached to the argument from mere inconvenience. * * * The courts have nothing to do with the argument from inconvenience."

Again, says Black, p. 106:

> "It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding and defeating them.
>
> "Accordingly, in case of any doubt or obscurity, the construction will be such as to carry out these objects."

The example given by Black was the construction of an act imposing a tax on dividends which placed it in the power of directors to so declare dividends as to escape taxation. That construction was not adopted, the act being reasonably susceptible of another construction, whereby a revenue was secured.

That case was not so flagrant an example of erroneous construction as this.

Surley the Court in that case did not go so far as to characterize the action of the Collector upon the plain language of a mandatory statute as an ingenious method intended for the benefit of the revenue. The ruling of the Board all tends, on the '*argumentum ab inconvenientum*,' to a reduction of the revenue.

I respectfully insist that upon the language of the Wilson Act, especially upon the provisions demanding specifications in detail of the invoices showing which were self working bales, it was the plain purpose to tax wrappers wherever found, and in whatever per cent., and that the proviso touching fillers mixed with wrappers was not intended to release any wrappers, but to penalize fillers for having an admixture of over 15% of wrappers in any mass.

This seems to be too plain for argument. And if this be true, the only way to reach the adjustment of taxation on wrappers and fillers in mixed

bales was by constructively separating the two by mentally grouping them.

They were not taxed collectively upon a classification based on the per cent. of each in a mass, as under the Act of 1883. It was not contemplated by the Wilson Act that they should be actually separated. The contrary was plainly anticipated. And being so, the only way of reaching the result demanded by the detailed specification in the invoices was the way which the Board of Appraisers denied.

The absurd conclusion reached in that case by the Board in its struggle to maintain the bale as a unit under the Wilson law, because it had been held to be the unit under the law of 1883, is not strengthened by the citation of only a portion of what was said by Shiras, J., in Erhardt *v.* Shroeder, in construing the Law of 1883. It is true that he said: "If a bale or other separate and concrete quantity of tobacco contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale, &c., would be the unit." But why did the Board of Appraisers stop there? His next words were: "On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

Thus we see the Board citing, in support of its idea that the bale is the unit, a decision, the language of which, if it means anything, repudiates the contention of the Board; and quoting only a part of the language used.

Neither the language quoted nor that omitted has any bearing, however, upon the Wilson Tariff Law.

Say the Board of Appraisers, in the El Paso Cig. Mfg. Co.'s case: "It is well known that, in commercial transactions relating to tobacco, the bale is the unit, and the legislation of Congress was made with reference to the fact." Suppose that is true. What does it prove?

Does it follow that because the bale is the *unit of bulk*, it must therefore be, in commercial transactions, or in the contemplation of a tariff law, a unit of *quality?* If so, what is a self-working bale?

The Board of Appraisers themselves announced that there are certain grades, known as "working up stock," the trade term meaning such a *bale* as would furnish sufficient wrappers to work up the bale, using the remainder for filler. Thus we see the instance given by themselves of a unit of quantity which is not a unit of quality.

How would the Board classify such a bale?

It is admitted that the Government is seeking to tax the quality of leaf tobacco known as wrapper at the higher rate. If the sole idea of Congress was with reference to the bale as a unit of quality as well as quantity, the contents of a self-working bale must be unified, although in it wrappers were confessedly packed with tobacco of filler grades, and the law required the fact to be specified in detail in the invoice.

If we enter upon an examination of the quality of the leaves composing its contents, the bale ceases to be a unit for determining the rate of taxation.

To such a bale the language of Shiras, J., not quoted, would beyond doubt apply. "If the bale contained tobacco of two classes, the unit would be the ascertained quantity of each." And if such be the rule, the per cent. of tobacco of the two classes respectively found in a bale, be it large or small, is the true matter to be determined. Each class was taxed by the Wilson bill, according to its quality and the quantity thereof found in the mass examined, subject to the proviso that if the per cent. of fillers was less than 85% of the mass, the fillers should pay wrapper duty.

I have been unable to find that the ruling of the Board, just discussed (15,692), was appealed from, and so far as I can ascertain, this last decision was

the last ruling of the Board or the Courts upon the Wilson bill. The decision of the Board of General Appraisers was manifestly wrong, and has doubtless influenced the Board of General Appraisers in repeating its error in deciding upon the Dingley bill, which is the subject of this appeal. I have dwelt at length upon the decision because I consider a fair presentation of the present case involves a study of every tariff act since the Act of 1883, and the rulings thereunder, upon the subject of wrapper and filler tobacco; and for the further reason that an exposure of the perfunctory consideration given to prior laws and the erroneous rulings of the Board of General Appraisers thereon explains its palpably erroneous decision of the present case.

The Dingley Tariff.

This act was passed July 24th, 1897. The courts, in considering it, have a right to recur to the history of the times when it was passed; the general state of public and legislative opinion of the period; and the occasion of the enactment of the law.

In the case of The People *v.* The Supervisors of Columbia County, 43 N. Y., 130, it was said: "The Court should place itself in the situation of the Legislature, and ascertain the necessity and probable object of the statute, and then give such consideration to the language used as to carry the intention of the Legislature into effect, so far as it can be ascertained from the statute itself." This Court will take judicial cognizance of the fact that the Wilson bill was enacted by a Democratic Congress, and enforced by a Democratic Administration. The theory of the Democratic party was that its tariff measures were enacted for revenue only. This Court will further take judicial cognizance of

the fact that the collections of revenues under the Wilson bill resulted in a deficit, and that the Government of the United States had, during the administration of Mr. Cleveland, been compelled, in order to meet its current obligations and to maintain its Treasury reserve, to issue Treasury bonds. Another political fact which must be considered by the Court is that the Presidential campaign of 1896 turned largely upon the question of what revenue policy should be adopted thenceforth; and that the Republican and Democratic parties respectively were distinctly opposed to each other on this issue. The Republican party advocated high tariff—a protective tariff; the Democracy advocated a low tariff or tariff for revenue only.

The Republican party was restored to power. It elected as President the reputed author of the last Republican tariff measure. The McKinley bill had not only omitted no wrappers from the high rate of taxation, but had imposed wrapper duties upon any bale, box, package or bulk of tobacco, if any portion of any tobacco therein was suitable for cigar wrappers. The Republican Congress was elected in a campaign in which the Republicans advocated, as a protection against the future issue of bonds, the reenactment of a tariff measure substantially like the McKinley protective tariff act, with provisions at least as binding as those embodied in that law.

It fell to Mr. Dingley to offer and control the passage of the new tariff measure of July 24th, 1897.

With these political events fresh in mind it would be absurd to seek for the motive, or the intention of the Republican Congress in the enactment of the Dingley law, by turning to the Wilson law for information and guidance. The plain purpose of the Dingley law was to repeal the Wilson law. While the Wilson law may be said to be an act in *pari materia*, in that it relates to the same

subject of legislation, it can throw no light whatever upon the plan or the motive of the legislation known as the Dingley bill, save that the Court may safely assume that no plan and no motive of Mr. Wilson and his associates was the plan of Mr. Dingley and his associates.

For the purpose of fairly and justly considering the Dingley act, passed July 24th, 1897, we must go back to the last Republican Tariff Act, the McKinley Act, and eliminate from consideration the intermediate measure of the Democracy known as the Wilson bill. It can in no sense be considered as sympathetic with the tariff measures which preceded or succeeded it. It should only be considered, in connection with the tariff policy of the Republican party, as having, in the first place, overthrown the Republican policy; and as having, in the next place, been repudiated by the people when they restored the Republican party to power.

With this clearly in mind, let us examine the terms of the Dingley Act and see if it is true that, in its motive, in its design or by its language it intended to exempt from taxation at the higher rate any wrapper tobacco found in appreciable quanti ties in any package whatsoever. Section 213 of the Dingley Act reads as follows:

> "Wrapper tobacco, * * * if unstemmed, $1.85 per lb.; if stemmed, $2.00 per lb."

Section 214 defines what is meant by wrapper tobacco as that quality "of leaf tobacco which is suitable for cigar wrappers."

Section 213 may therefore be read as follows:

> 213. "That quality of leaf tobacco which is suitable for cigar wrappers, if unstemmed, $1.85 per lb.; if stemmed, $2.00 per lb."

But the act did not stop there. In order to tax the quality of leaf tobacco, Section 214 of the

Dingley bill forbade the entry of any leaf tobacco unless the invoices of the same specified *in detail* the character of such tobacco, whether wrapper or filler, its origin or quality. Specification in detail is not specification in bulk. Specification in detail is a statement of how much of that quality of leaf tobacco in the bulk was tobacco suitable for cigar wrappers, and that quality of leaf tobacco so specified in detail as suitable for cigar wrappers was taxed, if unstemmed, $1.85 a lb.; if stemmed, $2.00 per lb., and no per cent. of it whatever was exempted, wherever it was found or however it might be associated with other tobacco. That this is so is shown by the requirement of Section 214, that the Appraiser should examine at least ten hands in each examined bale, box or package, for the classification of any imported leaf tobacco, and that at least one bale, &c., in every ten, and at least one in every invoice, should be examined. Not a word is said in the statute about exempting any per cent. of wrapper tobacco if the same be found. Not a syllable is uttered about classifying the quality of a given quantity of tobacco, according to the per cent. of one quality or another of tobacco in any quantity as a unit.

In the two cases above cited, decided under the Wilson law (15,586, G. A. 2,846), decided December 27th, 1894, and (15,692, G.A. 2,873), decided January 23d, 1895, the General Appraisers laid great stress upon the fact that the act defined wrapper tobacco as that quality of leaf tobacco *known commercially* as wrapper tobacco, and that in the fourth proviso of Section 185 the language used was, "*If any bale, &c.*, of leaf tobacco of *uniform quality* contains exceeding 15% thereof of leaves suitable, &c., *then* the entire contents, &c., shall be subject to the same duty as wrapper tobacco."

In view of the first definition the Board pointed out that, upon trade testimony, the same mer-

chandise might be classified differently under the Wilson and McKinley Acts by taking trade testimony under the Wilson bill to show that certain bales with wrappers in them did not contain that *quality* of leaf tobacco *known commercially* as wrapper.

Here, again, was an instance of the *trade* swearing away the Government's revenue on wrapper tobacco by establishing that certain bales, although they might contain a percentage of wrappers, were not *bales* of *a quality* of leaf tobacco *known commercially* as wrapper. Proviso fourth of Section 185 of the Wilson bill introduced the excuse for taking a bale as a unit and a uniform quality in the bale as a basis for classification, and Section 184 of the Wilson bill opened the way for *the trade* to testify on the point of what was *known commercially* as wrapper tobacco.

Following up this special pleading the General Appraisers, in deciding the second case (15,692), pinned the Government down to an implied admission that the bales under examination were of *uniform quality;* seized upon the reference to the *bale* in the Wilson Act to declare it the unit; argued that the small proportion of wrapper in the bale showed that the bale was of uniform quality; and declared that such a bale would not be considered commercially as wrapper.

Now, not one of the expressions in the Wilson bill on which these rulings of the Board of General Appraisers are based were re-enacted in the Dingley bill.

All are omitted. In the majority opinion delivered by the General Appraisers, they tell us, referring to another omission, what is to be inferred by such omissions in subsequent enactments. Their statement of the rule is correct, although their particular application of it was erroneous.

They say:

> "The language of that paragraph was not retained in the subsequent act * * * and its omission is plainly significant of the legislative intent to change the law on this particular subject."

Let us apply that principle to these significant changes by the Dingley bill from the language of the Wilson bill.

Bear in mind that the Wilson bill was enacted August 28th, 1894.

That in December, 1894, and January, 1895, it was construed as above by the Board of General Appraisers.

That in November, 1896, a great struggle occurred, involving the question whether the tariff views embodied in the Wilson bill should continue to prevail, or the views embodied in the repealed McKinley bill should be the future policy of the Government.

That McKinley was elected, and the Republican ideas of tariff legislation were committed for formulation into this measure, to Hon. Nelson Dingley, a pronounced high tariff man.

It is fair to presume that in the preparation of the new measure he had before *him* the language of the Wilson Act, and he also had before him the construction which had been placed upon it by these General Appraisers and the courts, and that he called into his counsels his associates familiar with the legislative and judicial history of the subject.

In the light of these well-known facts the Dingley bill should be construed with reference to what of the Wilson legislature it omits as well as with reference to the ordinary grammatical meaning of the language it employs.

Let us examine, then, several material differences between the language of the two acts.

The Wilson bill, Section 184, proviso first, declared: "The term wrapper tobacco * * * shall be taken to mean that quality of leaf tobacco *known commercially* as wrapper tobacco." The Dingley Act says: "The term wrapper * * * means that quality of leaf tobacco which is suitable for cigar wrappers."

Is there any reference to the trade in this language? None. No matter how it may be known commercially, leaf tobacco which is suitable for cigar wrappers is taxed. Where leaf tobacco suitable for cigar wrappers was imported, it was to pay, and no trade experts were to determine whether it was "known commercially" as wrapper tobacco, because of its appearing in large or small proportions in a bale, or by itself or packed with other tobacco. The omission of the words which opened the way to inquiry about commercial understandings, whether leaves suitable for cigar wrappers were or were not wrappers, was intentional, beyond question. The language was, and is, "Leaf tobacco which is suitable for cigar wrappers, if unstemmed, $1.85 per lb.; if stemmed, $2.50 per lb." There was no qualification that if such tobacco was found mixed or packed with more than 85% of filler, or other leaf tobacco, it was to be treated as filler. It was not even taxed as part of any bale, box, package or bulk in which it might be found. Is not this a significant change?

Again: The Wilson Act, Section 185, proviso fourth, said:

> "If any bale, box, package or bulk of leaf tobacco of uniform grade contains exceeding 15% thereof of leaves suitable, &c., for wrappers for cigars, *then* the entire contents shall be subject to the same duty as wrapper tobacco."

The Dingley bill said:

> "Filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, * * * if unstemmed, $1.85; if stemmed, $2.50."

There is no use of the word "if," or reference to any "bale, box, package or bulk," or to the "uniform quality" of any such bale, box, package or bulk.

All the ifs and buts and doubts about what may be the commercial understanding or the unit are swept away.

Wrapper tobacco is all leaf tobacco suitable for cigar wrappers. Filler tobacco is all other tobacco. The duty on each is defined, and if filler tobacco is found mixed or packed with more than 15% of wrapper, it is taxed as wrapper, whatever may be the mass in which it is mixed. No per cent. of filler is released in any event. In certain events filler pays the high rate, but, wherever found, is taxed. It was not the intention to release any part of it from one rate or the other. Why should it be presumed that it was the intention to release up to 15% of wrapper mixed with filler, when the whole intent shown was to penalize rather than reward such mixture.

The men who framed the law were seeking to tax that quality of leaf tobacco which is suitable for cigar wrappers at the designated rate of taxation, or at the high rate of taxation, wherever found, and in whatever quantity found, exactly as McKinley had done in the last Republican measure before it was repealed by the Wilson Act. This seems too plain for argument.

Says Black, p. 18:

> "It is but a corollary to the general rule in question that nothing is to be put to or to

be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express."

And the same authority, at p. 72, says:

"It is to be taken as a fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter as to its wisdom or justice. If the language admits of no doubt or secondary meaning, it is simply to be obeyed without more."

Says Maxwell, on Interpretation of Statutes, 1896, p. 3:

"The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical meaning, if they have one, and in their popular meaning, if they have not, and that phrases and sentences are to be construed according to the rules of grammar; *but from this prescription it is not allowable to depart where the language admits of no other meaning.* * * * If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be considered in the ordinary and natural meaning of the words and sentences."

And again the same author says, on p. 4:

"Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous."

And again, at page 5, it is said:

> "However unjust, arbitrary or inconvenient, the intention conveyed may be, it must receive its full effect. * * * The duty of the Court is not to make the rule reasonable, but to expound it as it stands according to the real sense of the words."

Applying the above unquestioned canons of construction to the Dingley Tariff Act of 1897, how can it be said with any sort of support from the language of the Dingley or the McKinley Acts, as is said in the opinion in this case by the Board of General Appraisers, that "Congress seems to have dealt with tobacco importations upon the theory that a margin of 15% would be just and ample."

The McKinley bill allowed no margins of any per cent., and, in the Stachelburg case, the only case arising under it, Judge Cox declared the language of the McKinley bill was too plain for argument.

In the next Republician measure, to wit, the Dingley bill, not a word is said as to any per cent. exemption of that quality of leaf tobacco which is suitable for cigar wrappers, and yet we have lugged into this decision of the General Appraisers the idea that Congress seems to have dealt with tobacco importations upon the theory that a margin of 15% would be just and ample.

Let us see on what penumbra this erroneous theory of the Board of Appraisers is based. In the McKinley bill, so keen was the search of the Republican policy for leaves fit for wrappers on which to place the high tax that if any leaves fit for wrappers were found commingled with leaves of filler grade, or other quality of leaf tobacco, the whole bulk was at once treated as wrappers, and taxed accordingly.

Why was this? Because, in the first place, the Supreme Court had declared that, prior to the en-

actment of these revenue measures, it had been the custom to pack leaf tobacco and tobacco of the lower grades in separate packages, and there was no good reason for commingling them after the passage of the tariff acts, except with a view of evading the revenue. In the next place, it was the policy of the Government to compel importers to keep the grades separate, so as to make their classification for taxation easy and convenient, without imposing any real inconvenience to the importers. And, in the next place, it was the purpose of the McKinley bill to avoid a condition of packing which would lead to such conflicting irreconcilable decisions, growing out of a calculation of per cent. of the one grade or the other present in a package, as had resulted from the peculiar phraseology of the Act of 1883. All these considerations led to the bold course of the McKinley bill, whereby the entire bulk of every package in which there was any wrapper tobacco, was taxed at wrapper rate.

When the Republican party was restored to power, it found that the Democrats had so modified the McKinley Act as not to tax the entire package at the wrapper rate, unless it contained over 15% of wrapper tobacco. It is by no means certain that even the Wilson bill intended, where a bale contained 14% of leaves suitable in color, &c., for wrappers, and 86% of leaves not so suitable, to permit the 14% of wrapper leaves to escape the higher rate of tax.

I think I have demonstrated that such was not the purpose of that act; that in such case the true construction would have been to tax 14% as wrappers and 86% as fillers. Still the language of the proviso of Section 185 of the Wilson Act was peculiar in that it said "that if any bale, &c., *of uniform quality contains*," &c.

When the Republican party was restored to power, it found that a construction had been

placed upon the Democratic measure such that it admitted bales containing 85% or more of filler tobacco without penalizing them for having wrapper tobacco, 15% or less, associated with filler, and taxed the wrapper as filler.

I have already explained why such a provision might be reasonable in the case of self-working bales. The Republican party, in a modified way, continued this provision. It did not, however, adopt the bale as a unit, nor did it introduce the factor of uniform quality in the bale, box, package or bulk. The whole enactment was as follows:

> Section 213. "Filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, if unstemmed, $1.85 a lb.; if stemmed, $2 per lb. Filler tobacco, not specially provided for in this act, if unstemmed, 35c. per lb.; if stemmed, 50c. per lb."

This language seems too plain for discussion. It has no reference whatever to a tax on wrapper tobacco. It relates entirely to a tax on filler tobacco. One class of filler tobacco is specially provided for, to wit, if it is imported mixed or packed with more than 15% of wrapper tobacco, it (the filler tobacco) must pay the wrapper rate, and all other filler tobacco is to pay 35c. a lb. if unstemmed; 50c. per lb. if stemmed.

What could be plainer? This language does not release any wrapper tobacco wherever it is found. It only defines the duty on filler tobacco. It imposes the higher rate upon it unless it amounts to 85% or more of the tobacco with which it is mixed or packed, and if it amounts to 85% of the tobacco, with which it is mixed or packed, it pays 35c. One would think the language so plain as to require no discussion and an argument which seeks to deduce from this language an exemption of wrapper tobacco to the extent of 15 pounds in a hundred,

surely sounds like an effort to import into a statute language which is not there, and a meaning which the words of the statute do not fairly convey.

I have already quoted two authorities upon the point that the construction which facilitates the evasion of a statute should be avoided, and that in construing the statute it is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and will prevent persons from eluding or defeating them.

A word upon that subject. In the decision of this case, the Board of Appraisers, in the majority opinion, has gone out of its way, as it seems to me, to argue in behalf of the idea that Congress intended to take no notice of small quantities of wrapper tobacco, where such tobacco was found in bales. That idea is certainly not justified by any language of the Dingley Act. The Dingley law entirely omitted the idea of the bale, the box, or the package, or the "uniform quality" of the contents of any bulk. It taxed wrapper tobacco, and did not omit from that tax any per cent. of wrapper tobacco, either 1% or 10% or 15% when found. To have done so would have been to open the door to fraud upon the revenue to be derived from wrapper tobacco. It is true that the Board of General Appraisers allowed witnesses to appear before it who testified that *generally in large tobacco and cigar factories* no quantity of wrapper tobacco (ordinarily packed in a commercial bale) less than 5% *is commonly segregated* or used for wrappers. We are told also that it is not profitable to separate and utilize it. Some witnesses (presumably representatives of large tobacco and cigar factories) put the quantity as high as 10% or 12%, and others as high as 15%. We are also informed that it is alleged that no quantity less than that specified by the witnesses respectively is capable of profitable utilization by dealers

and makers. It will be observed that this computation relates to *large tobacco and cigar factories.* It is not alleged to apply to the class of small makers who prefer to buy and handle self-working bales. With the large capital of large tobacco and cigar factories, they undoubtedly buy large quantities of tobacco. One bale of wrappers to about seven of fillers. They undoubtedly buy high grade clean wrappers, with an unappreciable admixture of fillers. They undoubtedly buy fillers packed with the least per cent. of wrappers, because they are seeking in their filler bales only fillers, and the presence of wrappers to an appreciable per cent. in filler bales adds nothing to their stock, unless they go into a separation of grades, and tends rather to enhance the price of the filler bale. They may well, therefore, say that no quantity of wrapper tobacco ordinarily found in their filler bales is commonly segregated or used for wrappers *in large tobacco and cigar factories.* But note that this relates to *large tobacco* and cigar factories; and observe that some of these witnesses, representing even this class, place the per cent. worth searching for in such bales as low as 5%. Whatever men of this class, or men testifying about the usages of large tobacco and cigar factories, may say, the statement is not applicable to the case of small dealers. There is not a small dealer in America who would not rather buy a filler bale with 15% of wrappers in it, than buy a bale of pure fillers without any admixture of wrappers. It pays such dealers to search out and separate the leaves suitable for wrappers, and to utilize them in their small dealings. They will look for them down to 2% or 3% of the contents in such bales, as may be seen by the examination of their product. Thus we have a large class of dealers in imported leaf tobacco, whose wants of wrapper are supplied by a bale of fillers containing much less than 15% of wrappers.

The authorities which I have cited declare that a construction which facilitates the evasion of a statute will be avoided, and that "it is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding and defeating them."

This is not good law if the construction placed upon this Dingley bill by the Board of General Appraisers is correct. If it were allowed to stand, a large class of people using imported leaf tobacco can, and would, buy all the wrappers they need, and manufacture all the cigars they could, without paying one dollar duty on wrapper tobacco. It is an undisputed fact that the wrappers do not amount to exceeding 15% of the tobacco in a cigar.

Such a construction was an outrage upon the legislative branch of the Government, and imports into the statute a meaning nowhere discoverable in its language, or in the purpose of the framers of the law.

But this is not the worst result of this argument of inconvenience set up by the Board of Appraisers. They have fallen into a trap prepared for them by the importers and the representatives of large tobacco and cigar factories. Under the specious plea that Congress intended to ignore and take no notice of a little per cent. of wrappers found in a bale; and in a case where the actual per cent. of wrappers present is but 3% or 4%; the Board of Appraisers, as if opposed to a cold close search for protective revenue, have said, in the face of the unqualified language of the Dingley bill, that wrapper tobacco found mixed or packed with filler or other tobacco shall not pay wrapper duties, but shall pay filler duties, unless it amounts to more than 15% of the bulk in which it is mixed or packed. As I view this, it is a wrong upon the Government. True, they say it is an insignificant

matter. They pooh pooh the idea that the Government intended to lay the higher rate of tax upon so small a per cent., and when a faithful Collector found this small per cent., identified it, and would have collected the tax upon it, as the law directs, these gentlemen pooh poohed this performance of his plain duty and characterized his action as "an ingenious idea for the raising of revenue." Raising revenue has been the ingenious idea of Republican legislation throughout the history of the party, and denunciation of the ingenuity of the Republican party in raising revenue has been the constant capital of its defeated rival political organization. This is a political fact which should be borne in mind against an ingenious and evasive construction of this Dingley Act. But what shall be said of the "ingenuity" of those who construed this act in such wise that, if their construction were correct, it would put an end to the revenues of the United States at the higher rate of duty from the quality of leaf tobacco fit for use as wrappers for cigars. They rendered a decision which would tax wrappers as fillers, unless they amount to over 15% of the bulk of tobacco with which they are mixed or packed, because they were convinced by the testimony of certain witnesses that it does not pay to separate any quantity of wrapper tobacco in a commercial bale where it amounts to less than 5%; that it is not profitable in such case to separate and utilize it; some of the witnesses saying that in large tobacco and cigar factories such a small per cent. of leaf is not customarily segregated and used for wrappers. True, they said some others place the quantity as high as 10% and 12%, and others as high as 15%. But note that none of this class of swift witnesses of special interests placed the per cent. beyond 15%. If the ruling of the Board of General Appraisers had stood the next importation of filler tobacco would not have contained 3% or

4% of wrappers. It would contain 14½%, nay, 15%. If, according to the ruling of this Board of General Appraisers, there must be more than 15% of wrapper tobacco in the imported mass before it pays any wrapper duty, we would have a re enactment of the methods of the importers, resorted to while the Act of 1883 was in force. They would not lay in the wrappers separately as they did in the Falk case. They would mix them and pack them together. Large tobacco and cigar factories would bring in 15% of wrappers in filler bales, and pay filler duties upon them. None of the witnesses deny that it would pay large as well as small dealers in such case to get out the 15% of wrappers by paying 35c. instead of $1.85 on every 15 lbs. so imported. The importers save $1.50 a lb. on 15 lbs. in every hundred, or $22.50 a hundred on the hundred lbs. of tobacco. The 15 lbs. of wrapper tobacco, thus imported, would be ample to work up the 85 lbs. of fillers. There would be no occasion, even for the large tobacco and cigar factories, to import any wrapper tobacco separately, and the Government would thenceforth receive no revenue upon wrapper tobacco, owing to this absurd construction of the Board of General Appraisers, which facilitates the evasion of the statute and renders the higher rate of tax imposed upon that quality of leaf tobacco suitable for cigar wrappers, both inoperative and ineffectual, and enables persons to elude and defeat the law.

In the argument of this case in the court below, counsel for the importers dwelt, with emphasis, upon the statement that the importers were not packers, and, therefore, did not control or direct the manner in which tobaccos are blended in the bales imported. Theoretically that may be true, but, as a matter of fact, there can be no doubt that bales are packed on the plantations or in for-

eign warehouses, under the direction of, or upon suggestions from, the importers. I need only cite the Falk case as an evidence of what importers do concerning the packing of tobacco. It was further said that Congress never intended to discourage the mixing of tobacco in bales. This is assuredly not true, for the McKinley bill taxed all the tobacco in a bale as wrapper tobacco if any wrappers were found in a bale of fillers.

In the case of Garcia & Co., G. A., 2846, it was said:

> "There are also certain grades of tobacco,
> "known as working up stock, the trade
> "term meaning such a bale as would furnish
> "sufficient wrappers to work up the bale,
> "using the remainder for filler, and these,
> "although not commercially wrapper bales,
> "if manufactured in their fresh condition,
> "would produce a good percentage of wrap-
> "pers."

Thus we see that, by the adjudication of the Board of General Appraisers, these self-working bales do contain, and are known to contain, two distinct grades of tobacco; yet, by the ruling which was sought to be maintained in the court below, if such a bale contained 14% of recognizable wrappers, they would be liable only to tax as fillers; whereas, if it had 16% of wrappers, no more plainly wrappers than those in the bale containing 14%, the wrappers would be taxed as wrappers. What sense is there in contending that an act penalizing fillers for association with over 15% of wrappers, offered a premium to wrappers for such association in a less per cent.? A difference of ½ of one per cent. in such case would make a loss of $22.50 to the Government on wrappers, as plainly wrappers as any other wrappers, when the manifest object of the provision was *not to release wrappers* under

any circumstances, but to penalize fillers for being packed with them.

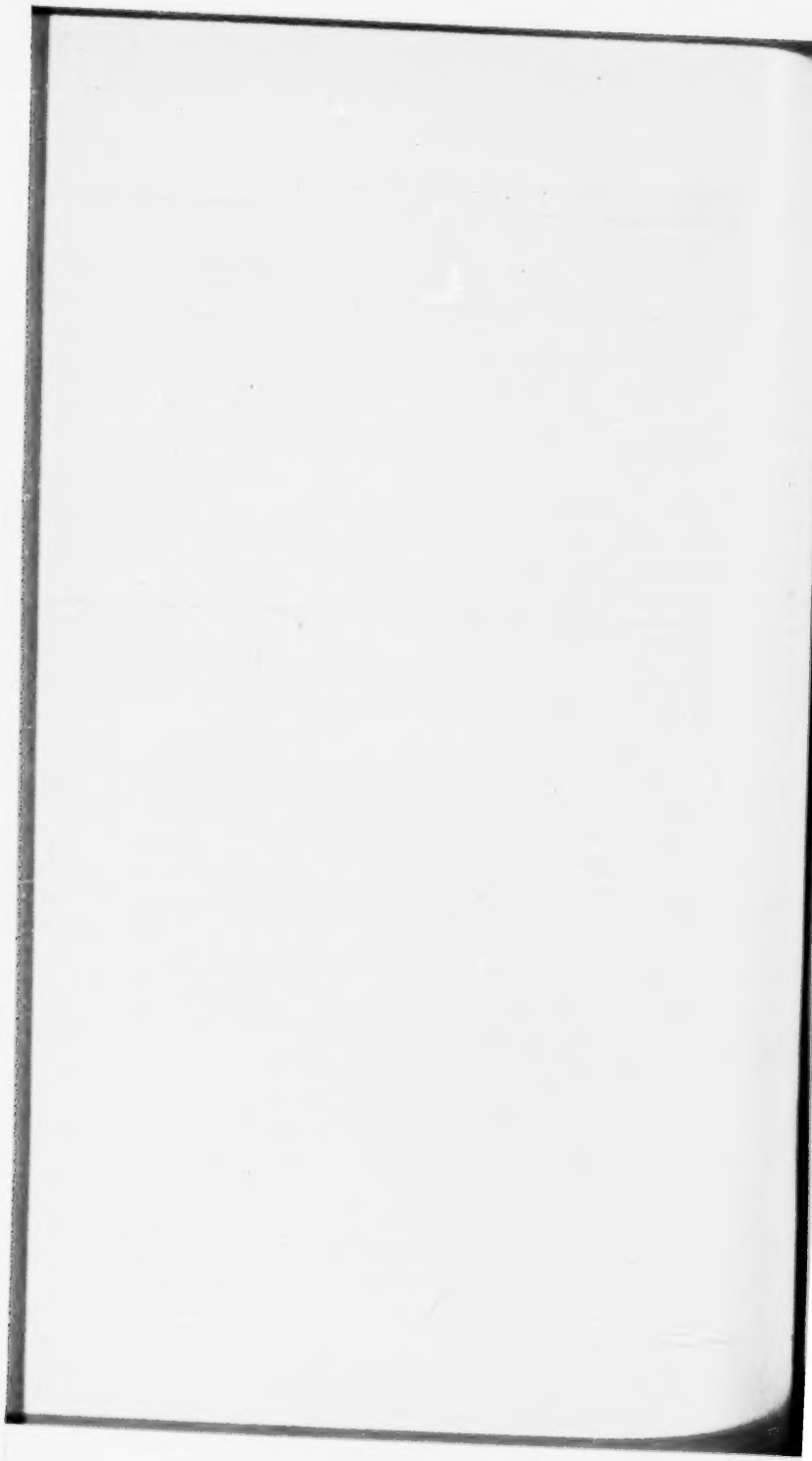
The substance of the contention of counsel for the importers in the court below was that the language, "And filler tobacco, when mixed and packed with more than 15% of wrapper tobacco," really meant, not only what it said, but must be read as saying, "Tobacco, consisting of over 85% of fillers and less than 15% of wrappers, shall be taxed 35% as fillers."

If that was the intention of the law, why was it not so expressed? Why does it declare that leaf tobacco was of but two kinds, to wit, wrapper tobacco as defined, and then, "Filler tobacco means all other leaf tobacco." *The law defines two grades. The argument calls for three grades,* to wit, wrapper tobacco, filler tobacco *and mixed tobacco.* The first to be taxed high, the latter two to be taxed low. Surely, if that was the intention of the legislators, they would have so expressed it. The statute is too plain for such a contention. It states, in so many words, Section 214, wrapper tobacco is "that quality of leaf tobacco which is suitable for cigar wrappers," and when it is found it taxes it, no matter in what company it may be found. Then it says all other tobacco shall be deemed filler tobacco.

As was truly said by Judge Lacombe, in his decision in the Circuit Court, the percentage system was dropped by the Dingley tariff bill. I do not think any argument could add strength to his paraphrase of Sections 213 and 214 (page 123 of the record).

All of which is respectfully submitted.

JNO. S. WISE,
Special Assistant to Attorney-General.



Supreme Court of the United States.

No. 59.—October Term, 1900.

Rothschild & Brother, Appellants, *vs.* The United States. } On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[December 17, 1900.]

This case is here on certificate of the Court of Appeals of the Second Circuit. The case went to that court by appeal from the Circuit Court for the Southern District of New York which reversed a decision of the board of general appraisers. (80 Fed. Rep. 798.)

The statement of facts made by the Circuit Court of Appeals is as follows:

"The appellant imported from San Domingo into the port of New York in September, 1897, certain bales of unstemmed leaf tobacco, the product of San Domingo, in which bales there was mixed or packed with filler tobacco less than four per centum of leaves suitable for wrappers. The collector of the port assessed duty upon the leaves of filler tobacco in each bale at the rate of thirty-five cents per pound, and upon the leaves suitable for wrapper at one dollar and eighty-five cents per pound, assuming to do so conformably with the provisions of the tariff act of July 24, 1897, (Schedule F, 213, 214,) imposing duty on wrapper and filler tobacco as follows: 'Par. 213. Wrapper tobacco and filler tobacco when mixed or packed with more than fifteen per centum of wrapper tobacco, and all leaf tobacco the product of two or more countries or dependencies, when mixed or packed together, if unstemmed, one dollar and eighty-five cents per pound; if stemmed, two dollars and fifty cents per pound; filler tobacco not specially provided for in this act, if unstemmed, thirty-five cents per pound; if stemmed, fifty cents per pound.' 'Par. 214. The term wrapper tobacco as used in this act means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco.'"

The following questions are propounded:

"1. Is it the meaning of the tariff act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package?

"2. Is it the meaning of said act to subject to the duty of one dollar and eighty-five cents per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety at the date of the enactment, were commercially known in this country as 'filler tobacco,' and bought and sold by that name, notwithstanding such leaves constitute less than fifteen per centum of the contents?"

Mr. Justice McKenna delivered the opinion of the Court.

In paragraph 214, the statute defines wrapper tobacco to be that quality of leaf tobacco which is suitable for cigar wrappers, and filler tobacco to be all other leaf tobacco. Paraphrasing the paragraph and paragraph 214, Judge Lacombe classified the tobacco, and assigned duty as follows:

"A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers and not otherwise provided for.

"A duty of one dollar and eighty-five cents per pound shall be paid on—

"(A) All leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco, which other tobacco is the product of any other country or dependency.

"(B) All leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent. of tobacco which is suitable for cigar wrappers.

"(C) All leaf tobacco suitable for cigar wrappers."

To this classification the appellants oppose that of the board of appraisers, as follows:

"First. Wrapper tobacco.

"Second. Filler tobacco mixed or packed with more than 15 per cent. of wrapper tobacco.

"Third. All other *filler* tobacco."

If the classification of Judge Lacombe is correct the questions certified should be answered in the affirmative; if the classification of the board of appraisers is correct they should be answered in the negative.

The language and arrangement of paragraph 213 supports Judge Lacombe. Regarding the language of the paragraph alone, it requires some ingenuity to create ambiguity. Dealing with wrapper tobacco, the paragraph provides, "wrapper tobacco . . . $1.85 per lb." That is all unstemmed wrapper tobacco. There is no limitation or exception whatever. Dealing with filler tobacco, the paragraph provides, "filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, if unstemmed, $1.85 per lb.; if stemmed, $2.00 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35 cts. per lb.; if stemmed, 50 cts. per lb." In other words, so mixed, and as it is stemmed or unstemmed, $2.00 or $1.85 per lb. Filler not so mixed, as it is stemmed or unstemmed, 50 cts. or 35 cts. per lb. But all wrapper tobacco is dutiable at least at $1.85. There is no condition except being stemmed or unstemmed that excepts any part of it or affects the rate upon it. And all filler tobacco is dutiable, but not all at the same rate. There is a condition which affects the rate. That condition is to be mixed with wrapper tobacco. The statute deals with each kind of tobacco separately. It does not qualify wrapper; it does qualify filler—mix wrapper with filler to the extent of more than 15 per cent. and the wrapper does not become dutiable as filler—but filler becomes dutiable as

wrapper—the mixture becomes in legal effect wrapper, and is dutiable at the same rate.

The appellants contest this interpretation, and contend that wrapper so mixed with filler, by the very terms of the statute escapes duty or would escape duty, "except that it falls under the last clause of the statute and is to be classified as filler tobacco, not specially provided for in this act." If this contention is justified, it would seem as if wrapper tobacco becomes filler even by name and the provisions of the statute are reversed, and their care to make wrapper dutiable and prevent and penalize evasions of the duty become a means of either exempting fifteen per cent. of it from duty or making it dutiable only as filler.

Considerations outside of the statute are, however, urged as tests of its meaning, and two propositions are advanced which, it is claimed, Congress must be presumed to have known and to which it addressed its legislation.

These are, (1) that in commerce and among dealers in leaf tobacco the bale is the unit; (2) there is in bales of wrapper a certain amount of filler, and in filler bales there may be a small per cent. of wrapper, but in trade it is not recognized. It is therefore contended (and we quote counsel) "that the words 'wrapper tobacco' in this section (213) have reference to the commercial terms 'wrapper tobacco,' meaning thereby bales of tobacco known as wrapper, although in every bale there is a quantity of tobacco not suitable for wrapper." That is not the tobacco as such, but the form of its importation determines the duty. The bale is the unit, and the unit must always be regarded. The different kinds of tobacco cannot be separated; they mingle in the unit bale as (the illustration is) different percentages of blood mingle in an animal, and by holding in mind that the bale is the unit, it will be seen that wrapper tobacco (fifteen per cent. or less) cannot be "segregated and assessable as such any more logically than could the fifteen per cent. of Holstein blood in an eighty-five per cent. Ayreshire cow."

But the difficulty is not holding in mind the idea that the bale is the unit, but in accepting it. To accept it we should have to impose it upon the statute. It is certainly not there by expression, and it is not new. It was contended for under the act of 1883 and supported by about the same arguments upon which it is now attempted to be supported. It was rejected in *Falk* v. *Robertson*, (135 U. S. 225,) in which the leaf and not the bale was decided to be the unit, and the act of 1883 dealt with percentages as much as the act of 1897. The act of 1883 provided that "leaf tobacco of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound."

But it is claimed that *Falk* v. *Robertson* is distinguishable from the case at the bar in that the different kinds of tobacco were not mingled, but were carefully separated and distinguishable in quantity and quality. Upon principle we think the difference does not distinguish the case from that at bar. The contention is besides answered by *Erhardt* v. *Schroeder*, (155 U. S. 124.) To the claims of the parties—one that the bale was the unit—the other that the different kinds of tobacco were, the court, by Mr. Justice Shiras, said:

"The proper answer to this question seems to depend upon the particular circumstances of a given case.

* * * * * *

"If, then, a bale or other separate and concrete quantity of leaf tobacco, contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale, or other separate collection, would be the unit contemplated in the percentage and weight tests of paragraph 246. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

It is conceded that in *Erhardt* v. *Shroeder* it was decided that the bale was not the unit, but it is claimed that the decision was based upon the fact that the "whole importation was wrapper, and it made no difference what the unit was as the result would be the same if the wrapper tobacco in every bale was eighty-five per cent." We think not. Tobacco of different kinds in one bale was respectively assessed at seventy-five cents and thirty-five cents a pound. The tobacco in the other bales was assessed at seventy-five cents a pound. The claim of the importers was that it all should have been assessed at thirty-five cents, and in passing on the diverse contentions of the parties it was decided that the statute did not make an inflexible unit. What the unit would be, it was said, would depend upon the "particular circumstances of a given case." And speaking of the bale as such unit the court used the language we have already quoted.

Succeeding the act of 1883 came the act of 1890. Paragraph 242 provided as follows:

"Leaf tobacco, suitable for cigar wrappers, if not stemmed, $2 per lb. Provided, That if any portion of any tobacco imported in any bale, box or package, or in bulk, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box or package, or bulk, shall be dutiable; if not stemmed, at $2 per lb.; if stemmed, at $2.75 per lb.

"All other tobacco in leaf unmanufactured and not stemmed, 35c. per lb.; if stemmed, 50c. per lb."

This language is seemingly very explicit as to the duties on the different kinds of tobacco, and very unambiguous as to the effect of mingling them in bale, bag, package or bulk. And Circuit Judge Coxe pronounced it so in *Stachelburg et al.* v. *United States*, (72 Fed. Rep. 50.)

We are, however, referred to an opinion of the board of appraisers, in the matter of the protest of Emilio Pons & Co., which, it is claimed, was an

administrative interpretation of such paragraph, which not only determined its meaning but the meaning of the provisions of subsequent laws.

The importation passed upon was of Havana tobacco, and the conclusions of the board were very disputable even on the specific facts of that case. The board found there was well defined difference between Havana wrapper and filler and that in the best selected grades of each there was from five to fifteen per cent. of the other, and that filler bales having less than fifteen per cent. of wrapper were not recognized in trade as filler having any portion suitable for wrappers; over that percentage the bales were known as part wrapper, and also known as self-working bales. From these facts the board concluded that less than fifteen per cent. was not an appreciable quantity, and made the following special finding of facts:

"(1) That the tobacco in semi-Vuelta, uniform in quality, length and color, and is of the kind known in trade as Havana filler tobacco, leaf, unstemmed.

"(2) That it contains from 10 to 15 per cent. of leaves that can be used for wrappers for inferior cigars, but no portion thereof is of the quality known as wrapper tobacco.

"(3) That it is of a kind used exclusively by larger manufacturers of cigars as fillers for cigars.

"We hold that, within the meaning of the statute, there is no portion of the tobacco covered by this protest suitable for wrappers for cigars.

"The protest is sustained."

Counsel for the appellants say that the reasoning and spirit of this decision was accepted by the Treasury Department, but that its percentage was rejected. And well it might have been. The act which expressed in clear and definite words that the effect of mixing "any portion" of wrapper tobacco with filler tobacco in an importation was to make "the entire quantity" dutiable as wrapper, was interpreted to admit at filler duty fifteen per cent. of wrapper, a fraction less than was necessary to make a working bale, a bale with enough wrapper to use up the filler. This was a very liberal application of the maxim which expresses the disregard of the law for small things. If Congress did not intend to penalize an accidental or inevitable mixing of some leaves of wrapper with filler, it certainly did not intend to defeat or weaken its legislation. Giving the bale as a unit, as contended for; giving a fraction less than fifteen per cent. of its contents, though wrapper to be admitted at filler duty, how much wrapper would be otherwise imported?

However, the decision was rendered; how far was it a factor in determining the provisions of the act of 1894 (the Wilson act) and that of 1897, the act under consideration, must be passed upon.

Of the Wilson act we need only quote the following:

"Wrapper tobacco, unstemmed, imported in any bale, box, package or in bulk, $1.50 per lb.; if stemmed, $2.25 per lb.

"Filler tobacco, unstemmed, imported in any bale, box, package or in bulk, 35c. per lb.; if stemmed, 50c. per lb. Provided, that the term

wrapper tobacco, whenever used in this act, shall be taken to mean the quality of leaf tobacco known commercially as wrapper tobacco.

"Provided further: That the term filler, whenever used in this act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco.

* * * * * *

"Provided further: That if any bale, box, package or bulk of leaf tobacco, of uniform quality, contains exceeding 15% thereof of leaves, suitable in color, fineness of texture and size for wrappers for cigars, then the entire contents of such bale, box, package or bulk shall be subject to the same duty as wrapper tobacco."

As it will be observed, the act was more circumstantial than the act of 1890. It defines wrapper tobacco as meaning that "quality of leaf tobacco *known commercially as wrapper.*" And filler to mean "all leaf tobacco unmanufactured, not *commercially known* as wrapper tobacco." It did not provide, as the act of 1890 provided, if any portion of any tobacco imported be wrapper the entire quantity should be dutiable as wrapper. It fixed the wrapper which would have that effect at an amount exceeding fifteen per cent. of leaves in any bale, box, package or bulk of leaf tobacco of *uniform quality* . . . *suitable* in *color*, fineness *of texture and size*, for cigars.

If anything can be inferred from the qualifications which we have put in italics as connecting the act with the decision of the board of appraisers in the Pons case the inference must be dropped as to the act of 1897. All those qualifications are omitted except that the quantity of wrapper tobacco in the importation which will affect with wrapper duty the filler with which it is mixed is retained. But it is retained in such context, as we have already said, so as not to exempt any wrapper tobacco from duty as such, though it may charge filler tobacco with wrapper duty. It would make this opinion too long to analyze the Wilson act. We are inclined to think it should be interpreted as we have interpreted the act of 1897. But if we concede the construction of the appellants, it can only come from the qualifying words we have indicated. If their presence in the Wilson act determines the construction contended for, their absence from the act of 1897 determines against the construction of the latter act contended for, as it is also determined against by the character of the act. It precludes the view that any wrapper tobacco is to be admitted to importation under filler duty. And why should it be? There is nothing in the trade conditions urged upon our consideration which requires it. The mixing of the tobacco which may accidentally or necessarily attend the manner of picking and packing is provided for, and the indulgence of the statute so clearly expressed and defined should not be extended to exempt any portion of either tobacco from its full duty by assuming or accepting the arbitrary idea that the statute addressed itself to bales of tobacco and not to the tobacco in the bales.

We therefore answer the questions certified by the Circuit Court of Appeals in the affirmative.